SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 504.

THE UNITED STATES, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1908.

No. 1610.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff in Error,

v.

UNITED STATES OF AMERICA,

Defendant in Error.

MR. ROBERT DUNLAP,
MR. LEE F. ENGLISH,
MR. JAMES L. COLEMAN,
Counsel for Plaintiff in Error.

MR. EDWIN W. SIMS,
Counsel for Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

TRANSCRIPT OF RECORD FILED JUNE 9, 1909.
PRINTED RECORD.

Placita.

Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern Dis-ict of Illinois, begun and held in the United States Court Rooms the City of Chicago in the Division and District aforesaid, on the ird Monday of December, it being the Twentieth day thereof, in e year of our Lord One Thousand Nine Hundred and Eight and of e Independence of the United States of America, the 133rd year.

Present, the Hon. Solomon H. Bethea, and the Hon. Kenesaw M. ndis, Judges of said Court, Presiding, Luman T. Hoy, United ates Marshal for said District and T. C. MacMillan, Clerk of said ourt.

Petition.

Petition, filed Feb. 2, 1909.

The United States of America
16484 *vs.*
The Atchison, Topeka and Santa Fe Railway Company.

Be It Remembered that heretofore, to wit, on the 2nd day of February, A. D. 1909, there was filed in the Clerk's office of said Court, in the above entitled cause, a petition; said Petition being in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois

Eastern Division.

United States of America
v.
Atchison, Topeka and Santa Fe Railway Company. } Petition.

Now comes the United States of America, by Edwin W. Sims, United States Attorney for the Northern District of Illinois, and brings this action in behalf of the United States against the Atchison, Topeka and Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and station at Corwith, in the State of Illinois; this action being brought upon the suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

For a first cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock A. M., January 25, 1909, and ending at 6:30 o'clock A. M., January 26, 1909, required and permitted a certain telegraph operator and employee, to wit, Fred Hillhouse, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting train movements in interstate commerce at Corwith, in the

Petition, filed Feb. 2, 1909. 3

State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock A. M. on said twenty-fifth day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock P. M. on said twenty-fifth day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock A. M. to 6:30 o'clock P. M., aforesaid, he was given an intermission of three hours, to wit, from twelve o'clock noon to three o'clock P. M. on said twenty-fifth day of January, nineteen hundred and nine, and during said intermission he was not required and did not perform any work in connection with his said employment.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a second cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the states of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employees
4 thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large p. 1415), said defendant, during the period beginning at 6:30 o'clock P. M., January 25, 1909, and ending at 6:30 o'clock P. M., January 26, 1909, required and permitted a certain telegraph operator and employee, to wit, Edward Flaherty, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock P. M. on said twenty-fifth day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock A. M., on said twenty-sixth day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock

Petition filed Feb. 2, 1910.

P. M. on January 25th, 1909, to 6:30 o'clock A. M. on January 26, 1909, aforesaid, he was given an intermission of three hours, to wit, from 12:00 o'clock midnight on January 25, 1909, to 3:00 o'clock A. M. on January 26, 1909, and that during said intermission he was not required and did not perform any work in connection with his said employment.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a third cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Con-
5 gress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of
Petition, d Feb. 1909. employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock A. M. on said twenty-sixth day of January, nineteen hundred and nine, and ending at 6:30 o'clock A. M. on January twenty-seventh, nineteen hundred and nine, ---------- required and permitted a certain telegraph operator and employee, to wit, W. E. Sargent, ---------- a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and effecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock A. M. on said twenty-sixth day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock P. M. on said twenty-sixth day of January, ---------- nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock A. M. on said twenty-sixth day of January, nineteen hundred and nine to 6:30 o'clock P. M. on said twenty-sixth day of January, ---------- nineteen hundred and nine, he was given an intermission of three hours, to wit, from 12:00 o'clock noon on said twenty-sixth day of January, ---------- nineteen hundred and nine, to 3:00 o'clock P. M. on said twenty-sixth day of January, nineteen hundred and nine, and during said intermission he was not required

and did not perform any work in connection with his said employment.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

6 For a fourth cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri. Petition filed Feb 2, 1909.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock P. M. on the said twenty-sixth day of January, nineteen hundred and nine, and ending 6:30 o'clock P. M. on January twenty-seventh, nineteen hundred and nine, required and permitted a certain telegraph operator and employee, to wit, Edward Flaherty, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and effecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock P. M. on said twenty-sixth day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock A. M. on said twenty-seventh day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock P. M. on said twenty-sixth day of January, nineteen hundred and nine to 6:30 o'clock A. M. on said twenty-seventh day of January, nineteen hundred and nine, he was given an intermission of three hours, to wit, from 12.00 o'clock midnight on said twenty-sixth day of January, nineteen hundred and nine, to 3:00 o'clock A. M. on said twenty-seventh day of January, nineteen hundred and nine, and during said intermission he was not required and did not perform any work in connection with his said employment.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and
7 remain on duty during said period of time in said office

Petition, 1 Feb. 1909. and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

10 For a fifth cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock A. M. on said twenty-seventh day *day* of January, nineteen hundred and nine, and ending at 6:30 o'clock A. M. on January twenty-eighth, nineteen hundred and nine, required and permitted a certain telegraph operator and employee, to wit, F. M. Elliott, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and effecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock A. M. on said twenty-seventh day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock P. M. on said twenty-

11 seventh day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock A. M. on said twenty-seventh day of January, nineteen hundred and nine to 6:30 o'clock P. M. on said twenty-seventh day of January, nineteen hundred and nine, he was given an intermission of three hours, to wit, from 12:00 o'clock noon to 3:00 o'clock P. M. on said twenty-seventh day of January, nineteen hundred and nine, and during said intermission he was not required and did not perform any work in connection with his said employment.

Petition, 1 Feb. 1909.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

12 For a sixth cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock P. M. on said twenty-seventh day of January, nineteen hundred and nine, and ending at 6:30 o'clock P. M. on January twenty-eighth, nineteen hundred and nine, required and permitted a certain telegraph operator and employee, to wit, Edward Flaherty, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and effecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock P. M. on said twenty-seventh day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty, to the hour of 6:30 o'clock A. M. on said twenty-

13 eighth day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock P. M. on said twenty-seventh day of January, nineteen hundred and nine to 6:30 o'clock A. M. on said twenty-eighth day of January, nineteen hundred and nine, he was given an intermission of three hours, to wit, from 12:00 o'clock midnight on said twenty-seventh day of January, nineteen hundred and nine, to 3:00 o'clock A. M. on said twenty-eighth day of January, nineteen hundred and nine, and during said intermission he was not required and did not perform any work in connection with his said employment.

Petition filed Dec. 2, 1909.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency, nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

For a seventh cause of action plaintiff alleges that said defendant is a common carrier engaged in the transportation of passengers and property by railroad in interstate commerce among the several states and territories of the United States, particularly the States of Illinois, Iowa and Missouri.

Plaintiff further alleges that in violation of the Act of Congress known as "An Act to Promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, and in force and effect on and after March 4, 1908 (contained in 34 Statutes at Large, p. 1415), said defendant, during the period beginning at 6:30 o'clock A. M. on the said twenty-eighth day of January, nineteen hundred and nine, and ending at 6:30 o'clock A. M. on January twenty-ninth, nineteen hundred and nine, required and permitted a certain telegraph operator and employee, to wit, F. M. Elliott, a telegraph operator and employee of said common carrier, who, by the use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to and effecting train movements in interstate commerce at Corwith, in the State of Illinois, in the division and district aforesaid, while so employed in the office and station at Corwith aforesaid, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, from the hour of 6:30 o'clock A. M. on said twenty-eighth day of January, nineteen hundred and nine, at which time he was required and permitted to go on duty to the hour of 6:30 o'clock P. M. on said twenty-eighth day of January, nineteen hundred and nine, at which time he was permitted and required to go off duty; and during said period from 6:30 o'clock A. M. on said twenty-eighth day of January, nineteen hundred and nine, to 6:30 o'clock P. M. on said twenty-eighth day of January, nineteen hundred and nine, he was given an intermission of three hours, to wit, from 12:00 o'clock noon to 3:00 o'clock P. M. on said twenty-eighth day of January, nineteen hundred and nine, and during said intermission he was not required and did not perform any work in connection with his said employment.

Plaintiff further alleges that at the time the said defendant so required and permitted the said employee to be and remain on duty during said period of time in said office and station at Corwith, as aforesaid, there was no case of emergency nor any case of casualty or unavoidable accident or act of God.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore plaintiff alleges that by reason of the said several violations of the said Act of Congress, as aforesaid, defendant is liable to plaintiff in the sum of three thousand five hundred dollars.

EDWIN W. SIMS,
United States Attorney
Attorney for Plaintiff.

Endorsed: No. 10148. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. Atchison, Topeka and Santa Fe Railway Company. Petition. Filed February 2, 1909, T. C. MacMillan, Clerk. By Chas. A. Buell, Deputy. Edwin W. Sims, U. S. Attorney.

And afterwards, to wit, on the 2d day of February, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Praecipe for Summons; same being in the words and figures following, to wit:

11 United States of America, Northern District of Illinois, Eastern Division. } ss.

Praecipe for Summons, Feb. 2, 1909.

District Court District Term, A. D. 1909

United States
vs.
Atchison, Topeka & Santa Fe Ry. Co. } In Debt Damages, $3500.00

The Clerk of said Court will issue a Summons in said cause to said defendants, in a plea of debt to the damage of said plaintiff in the sum of Three Thousand Five Hundred Dollars, direct the same to the United States Marshal for said District to execute, and make it returnable to the next Term of said Court, 1909

Dated this 2nd day of Feby. A. D. 1909

Edwin W. Sims
Plaintiff's Attorneys.

To T. C. MacMillan, Esq., Clerk.

Endorsed: No. 10148. United States District Court, Northern District of Illinois, Eastern Division. The United States vs. Atchison, Topeka & Santa Fe Ry. Co. Praecipe. Filed Feby. 2, 1909 T. C. MacMillan, Clerk. Edwin W. Sims, Plaintiff's Atty.

And afterwards, to wit. on the 2nd day of February, A. D. 1909, there was issued out of and under the seal of said Court, in the above entitled cause, a Summons; same being in the words and figures following, to wit:

Summons, issued Feb. 2, 1909.

District Court of the United States of America, Northern District of Illinois. } ss.

The United States of America To the Marshal of the Northern District of Illinois—Greeting:

We Command You to Summon Atchison, Topeka and Santa Fe Railway Company if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term thereof.

12 to be holden at Chicago, in the District aforesaid, on the first Monday of March next, to answer unto The United States in a plea of debt in the sum of Thirty-five hundred dollars, to its damages, as it alleges, of Thirty-five hundred Dollars, and have you then and there this writ.

Summons, issued Feb. 2, 1909.

Witness, The Hon. Kenesaw M. Landis, Judge of the District Court of the United States of America, at Chicago aforesaid, this

Second day of February, in the year of our Lord one thousand nine hundred and nine and of our Independence the 133rd year.

T. C. MACMILLAN,
Clerk.

(Seal of Court)

Endorsed: U. S. M. No. 7771. Gen. No. 10148. District Court of the United States, Northern District of Illinois. The United States vs. Atchison, Topeka & Santa Fe Ry. Co. Summons. Returnable March Term, A. D. 1909. T. C. MacMillan, Clerk.

Mar-
al's re-
rn to
mons.

I have served this writ within my District in the following manner, to wit, upon the within named Atchison, Topeka and Santa Fe Railway Company by reading the same to and within the presence and hearing of Robert Dunlap, your attorney and aut'orised agent for the aforesaid Company, and at the same time delivering to him in person a true copy thereof this 3 day of February, 1909.

I was unable to find the President or other Officers of said Company.

LUMAN T. HOY,
Marshal
By E. R. DAVIS,
Deputy.

Service	$2.00
1 mile	.06
	$2.06

Endorsed: Filed Feb. 5, A. D. 1909. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 26th day of February, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Plea, same being in the words and figures following, to wit:

Plea filed
Feb. 26,
1909.

13 United States of America,
Northern District of Illinois.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
v.
The Atchison, Topeka and Santa Fe Railway Company,
Defendant.

General No. 10,148
Dept.

And the defendant, The Atchison, Topeka and Santa Fe Railway Company by Robert Dunlap, Lee F. English and James L. Coleman, its attorneys, comes and defends the wrong and injury when, etc., and

says that it does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against it; and of this the defendant puts itself upon the country, etc.

ROBERT DUNLAP
LEE F. ENGLISH
JAMES L. COLEMAN
Attorneys for Defendant.

Endorsed: Gen. No. 10148. Dept. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America, vs. The Atchison, Topeka & Santa Fe Railway Company. Plea. Filed this 26 day of Feby. 1909. T. C. MacMillan, Clerk. Robert Dunlap, Lee F. English, James L. Coleman, Attorneys for Defendant.

And afterwards, to wit, on the 15th day of April, A. D. 1909, the following order was had and entered of record, in said cause, to wit:

14 Trial.

The United States
10148. *vs.*
The Atchison, Topeka & Santa Fe Railway Company.

This cause coming on for trial comes also a jury of good and lawful men to wit: Bertram Turner, H. H. Proud, Wilson Conrad, C. R. Anderson, T. P. Flanders, Ernest Lehman, Nicholas Ragan, John Smith, Lyman Harrison, John Watnier, S. E. Walker and John Le Messurier who are duly elected, empanelled and sworn herein a true verdict to render according to the law and the evidence and the trial of this cause proceeds and during the examination of witnesses the usual hour of adjournment having arrived, It is Ordered by the Court that the further trial of this cause be continued until tomorrow morning at ten o'clock.

And afterwards, to wit, on the 16th day of April, A D. 1909, the following order was had and entered of record in said cause, to wit:

The United States
10148. *vs.*
Atchison, Topeka & Santa Fe Railway Company.

This being the day and hour to which the further trial of this cause was on yesterday continued come again the parties by their attorneys, comes again the jury who were duly elected, empanelled and sworn herein and the trial of this cause proceeds and during the examination of witnesses the usual hour of adjournment having arrived, It is Ordered by the Court that the further trial of this cause be continued until tomorrow morning at ten o'clock.

And afterwards, to wit, on the 17th day of April, A. D. 1909, the following order was had and entered of record in said cause, to wit:

Trial. 15

The United States
10148. *vs.*
Atchison, Topeka & Santa Fe Railway Company.

This being the day and hour to which the further trial of this cause was yesterday continued come again the parties by their attorneys and the defendants in their own proper person, come also the jury who were duly elected, empaneled and sworn herein as aforesaid, and the trial of this cause proceeds and during the examination of witnesses the usual hour of adjournment having arrived, It is Ordered by the Court that the further trial of this cause be and it hereby is continued until April 20, 1909 at ten o'clock A. M.

Verdict and Judgment.

The United States
10148. *vs.*
Atchison, Topeka & Santa Fe Railway Company

This being the day and hour to which the further trial of this cause was continued come the parties by their attorneys and comes also the jury who were duly elected, empanelled and sworn herein as aforesaid and said jury having heard the evidence by the parties adduced and arguments of counsel, said defendant enters its motion to instruct the jury to find for the defendant, whereupon the court being fully advised in the premises overrules and denies said motion, to which ruling of the court said defendant by its attorneys duly excepts; and thereupon said defendant moves the court to instruct the jury to find for the defendant on the first, third and fifth counts of the declaration, whereupon the court being fully advised in the premises overrules and denies said motion, to which ruling of the court said defendant by its attorneys duly excepts, and thereupon on motion of the plaintiff, by Edwin W. Sims, Esq., United States attorney, It is Ordered by the court that this cause be and the same hereby is dismissed as to the second, fourth and sixth counts of the declaration, whereupon the court instructs the jury to find the issues for the plaintiff on the first, third, fifth and seventh counts, to which

Verdict and Judgment. 16

instruction of the court the defendant by its attorneys, duly excepts, and thereupon the jury render their verdict and upon their oath do say, We the jury find the issues for the plaintiff, and thereupon the defendant by its attorneys, enters its motion for a new trial herein, and the court being fully advised in the premises overrules and denies said motion, to which ruling of the court said defendant, by its attorneys, duly excepts; and thereupon said defendant by its attorneys, enters its motion in arrest of judgment herein, whereupon the court being fully advised in the premises, It is Ordered that said motion be and the same hereby is overruled, to which ruling of the court said defendant by its attorneys duly excepts; and on motion

of Edwin W. Sims, Esq., United States Attorney for judgment on the verdict It is Ordered, adjudged and decreed by the court that the plaintiff the United States do have and recover of and from the Atchison, Topeka & Santa Fe Railway Company, defendant herein, the sum of One hundred dollars ($100.00) together with the costs in this behalf expended amounting to the sum of forty seven dollars and fifty cents, for which let execution issue; and thereupon the defendant by its attorneys, enters its motion for a writ of error to correct said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, and the amount of the bond is by the court fixed at the sum of seven hundred fifty dollars ($750) and fifty (50) days' time is allowed said defendant within which to file its bill of exceptions herein.

And afterwards, to wit, on the 28th day of May, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bill of Exceptions; same being in the words and figures following, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES

Bill of exceptions, filed May 28, 1909.

Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
v.
The Atchison, Topeka and Santa Fe Railway Company,
Defendant.
No. 10148.

BILL OF EXCEPTIONS.

Be it remembered that heretofore, to-wit, on the 15th day of April, 1909, the above entitled cause came on for trial at Chicago, Illinois, upon the issues joined herein, before His Honor Kenesaw M. Landis, a Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, and a jury duly impanelled and sworn; Whereupon the parties respectively offered and introduced the following evidence, and exhibits of evidence, and the following evidence was rejected, and objections and motions were made, and rulings of the Court were entered, and exceptions duly taken by the parties, all as follows, to-wit:

Appearances:

Mr. Edwin W. Sims, U. S. Attorney, Mr. Harry A. Parkin, Assistant U. S. Attorney and Mr. Philip J. Doherty, Attorney for the Interstate Commerce Commission, for plaintiff;
Mr. Robert Dunlap, Mr. Lee F. English and Mr. James L. Coleman, for Defendant.

Plaintiff's Evidence in Chief.

The defendant admits that the defendant at all times mentioned in the petition herein was a corporation of the state of Kansas having an office and station at Corwith, Illinois; that at all of said times it was engaged in interstate commerce by railroad.

That during the period covered by the declaration in this
ll of 18 cause there was no case of emergency, or casualty, or inevitable
p- accident or act of God affecting the operation of Corwith
, filed 28, station.

That Edward Flaherty went on duty at Corwith station at 6:30 p. m. Jan. 25, 1909, as telegraph operator, and worked until 12 o'clock midnight; that he then went off duty from midnight until 3 o'clock a. m., Jan. 26, 1909; that at 3 o'clock a. m. of Jan. 26, 1909, he went on duty and remained on duty until 6:30 a. m. of Jan. 26, 1909; that on Jan. 26, 1909, said Flaherty went on duty at 6:30 p. m. and remained on duty until 12 o'clock midnight or said date; that at 12 o'clock midnight he went off duty until 3 o'clock a. m., Jan. 27, 1909; that at 3 o'clock a. m., Jan. 27, 1909, he went on duty and remained on duty until 6:30 a. m. Jan. 27, 1909; that at 6:30 p. m., Jan. 27, 1909, he went on duty and remained on duty until 12 o'clock midnight; that he then went off duty from midnight until 3 o'clock a. m. Jan. 28, 1909; that he went on duty at 3 o'clock a. m. Jan. 28, 1909, and remained on duty until 6:30 a. m., Jan. 28, 1909.

Testi- F. E. HILLHOUSE, a witness on behalf of the United States of
ny of America, being duly sworn, testified as follows:
E. Hill-
use.

Direct Examination by Mr. Parkin.

I am a telegraph operator and live in Chicago. I was employed as a telegraph operator by The Atchison, Topeka and Santa Fe Railway Company on Jan. 25, 1909, at Corwith, Ill., which is in the outer limits of Chicago near 38th Street, about six miles south of here.

My department is in the freight office—transfer. I work in a separate room in the north end, upper story of the building; it is called the telegraph office. There are telegraph instruments there. I have been telegraph operator at Corwith over 2½ years. Train No. 2 referred to in time table 32 (Government Ex. 3) comes from Los Angeles, Cal.; it is an interstate train; it does not stop at Corwith. I did not handle any orders affecting the movement of that train; I handled no orders for the passenger trains. Santa Fe train order No. 22 of Jan. 28, 1909, would not affect train No. 2; none of the orders would have anything to do with train No. 2. Train No. 39 is made up at Corwith Yards; it is an interstate train. On Jan. 25th I took a train order about 11:30 a. m. for train 39; it read,
Testi- 19 "Clear No. 13 on time." Said order is Government Exhibit
ny of E. Hill- 1. The order was given by the train dispatcher at Chillicothe
use. and came to me by means of the telegraph instrument in the office at

Corwith. It is the daily practice, all but Sunday, when this train does not run, to get this order for train 39, and transmit it to the trainmen in charge of the train.

Witness identifies Government Exhibit 1, which was admitted in evidence, and is in words and figures as follows:

19 :
Form :
------:

: 19
: Form

Government Exhibit L.

(Form 938 Standard)
Santa Fe

To : Train Order No. 22

To C. & E. Ex. 594—593 :

To : Jan. 25, 1909

To : At Corwith

To : Station

X..... Opr. .....M

Clear No. 13 on time
R. H. A.

Conductor and Engineman Must Both Have a Copy of This Order

Made Comp. Time 11:28 A. M. Hillhouse Opr.

Testimony of F. E. Hillhouse.

The reason this order is issued is that we have a double track from Chicago to Toluca and all the trains have the same rights and are governed by block system. Train No. 39 is made up at Corwith; scheduled at Corwith. They issue this order so that train 39 will not get out and get delayed somewhere and lay out passenger train No. 13. No. 13 is running west and 39 is running west. No. 39 starts at 12:05 p. m. while No. 13 leaves Nerska (in Chicago) at 1:20 p. m. All odd-numbered trains are west bound; even numbered trains east bound. There is a train called 51 which makes up at Corwith and gets orders from the dispatcher at Chillicothe over the telegraph instrument at Corwith. No. 51 leaves Corwith at 6:45 a. m.; it is a local train between Chicago and Streator, Ill.

20 These are the only regular trains that get orders and make up at Corwith during the hours while I am on duty, but once in a great while they might make up other trains at Corwith and start them out. The regular trains that get orders at Corwith are 51 and 39. Sometimes they make up extra freight trains both interstate and local at Corwith but they start from 18th Street and would get their orders there. Trains 1st, 2nd and 3rd 33 sometimes fill in at Cor-

with; also train 47. These trains start from 18th Street but if they didn't have enough cars, a switch engine would go to Corwith and bring a bunch of cars to the train. Trains 33 and 47 are both interstate trains. They don't receive any orders at Corwith; they don't go through Corwith. The engine goes from Corwith to 18th Street; they take a caboose and go down and they get what freight they have there and put on additional cars necessary to make the train. Then the train proceeds to the station where they get their clearance. Corwith Junction is about a half mile from Corwith.

Mr. Coleman: This witness stated that those trains, 47 and 33, did not get orders at Corwith; consequently, I make a motion to strike out that testimony because it is irrelevant and immaterial as to the issues involved in this case.

The Court: It is somewhat material—

Mr. Coleman: Not if he gets no order issued there at Corwith station.

The Court: If there are no orders given it tends to negative the charge. Suppose the Government undertakes to prove that orders were given at Corwith, would it be material for you to put a witness on the stand showing orders were not given?

Mr. Coleman: Yes, your Honor, but I am trying to avoid confusion. I do not want the jury to understand that the station at Corwith has anything to do with the issuance of train orders for those trains No. 33 and No. 47.

The Court: He says they have not. I will over-rule the motion.

To which ruling of the court, the defendant, by counsel, then and there duly excepted.

I went on duty as telegraph operator at Corwith in the morning of Jan. 25th, 1909, at 6:30 a. M. I transmitted messages about the movement of cars, the delivery of cars and the general run of business. The yard master is there and we get messages ordering cars at different places and about exchange of cars between Corwith and other
21 points, mostly 12th street station, Chicago. I went off duty at 12 o'clock noon, and was off a period of 3 hours; I went on again at 3 o'clock p. m. and finished my day's work at 6:30 p. m. I remained continuously on duty from 6:30 in the morning until 12 noon, and continuously from 3 o'clock in the afternoon until 6:30 in the evening. Then I was off for three days and returned on the 29th of January. At Corwith we do not have anything to do with the movement of trains; the orders come from the train dispatcher at Chillicothe; all the orders I get governing trains is that order business in the morning, one at 6:45 and the other at 11:30 or 11:40 a. m. These orders come over the telegraph instrument; they affect the movement of trains. Sometimes we get an order affecting train No. 33 at Corwith when that train starts out from Corwith but it does not happen very often, just once in a while. It is done to protect that train if it gets anyways close onto a passenger train's time. As a general rule No. 33 makes up down town, but once in a while it is

made up and starts from Corwith and therefore gets that order. (Referring to Government Exhibit No. 2 hereafter set forth).

Witness identifies Government Exhibit 2 which was offered and admitted in evidence on behalf of the United States and is in words and figures as follows:

32 Form : : Form Government Exhibit 2.
19 : : 19
---- : (Form 938 Standard) : ------
---------- :

To	:	Santa Fe
To C. & E. No. 33	:	Train Order No. 43
To	:	Jan. 27, 1909
To	:	At Corwith
To	:	Station

X———— ——Opr. ———M
Clear No. 7 on time

R. H. A.
Conductor and Engineman Must Both Have a Copy of This Order

Made Comp. Time 11:42 P. M. Flaherty Opr.

Testimony of F. E. Hill house.

I did nothing but telegraph. The answers I made with reference to the 25th of January as to routine and practice is the regular practice. A little over two years ago I worked nights at Corwith, but not since. We do not receive or deliver messages over the telephone affecting train movements.

Cross-Examination by Mr. Coleman.

On Jan. 25, 1909, I went on duty at 6:30 a. m. and stayed on until noon, then went off duty for three hours; then went on duty at 3 o'clock p. m. and stayed on until 6:30 p. m. I did not work the next day but went to Fort Madison, not on company business but because my wife was sick. The telegraph office at Corwith is in a separate room; it has a telephone and a telegraph instrument. The telegraph instrument has a switch-board connection with the dispatcher's office and all stations. When I left Corwith office at noon, I put in the plugs at the bottom of the switch-board and that shuts off all communication so one could not send or receive a message over the wire and the dispatcher or anybody else could not call up Corwith
33 office; it would be impossible. Neither could Corwith call any office or station. When I went off duty at noon on Jan. 25th, 1909, I made that dis-connection. I locked my office door and did not

unlock it until I came back at 3 o'clock. During the time from noon to 3 p. M. the door is locked and the office private except that the yard master could get into it from his office but there is no other telegraph operator there at that time and nobody to attend to receiving orders. Orders could not come. I am the only operator at Corwith during the daytime and I was the only one on Jan. 25, 1909.

(Witness identifies document marked "Defendant's Exhibit No. 1")

It was posted on our wall at Corwith station on Jan. 25, 1909.

Said defendant's exhibit No. 1 was admitted in evidence and is in words and figures as follows:

"Defendant's Exhibit No. 1."

23 The Atchison, Topeka and Santa Fe Railway Company.

Chicago, Mch. 4th, '08.

Notice.

The hours of service for employes in telegraph and telephone service at Corwith Station will be:

Agent and Operator_____to_____and_____to_____
Day Operator 6:30 a. m. to 12 noon and 3 p. m. to 6:30 p. m.
Night Operator 6:30 p. m. to 12 mid. and 3 a. m. to 6:30 a. m.
_____ Operator_____to_____and_____to_____
_____ Operator_____to_____and_____to_____

The above specified hours of service are arranged to comply with the Federal law effective March 4th, 1908, and employes are hereby enjoined and forbidden from remaining on duty in any capacity for A. T. & S. F. Ry. Co. for a longer period than designated for each class of service as above, except in cases of emergency permitted by law.

A change in the hours of service for the above specified positions can only be made by the Division Superintendent by telegraph or written notice. Such changes will be made when necessary to better accommodate the business of the office, or on account of such urgent emergencies as the law permits.

C. B. STROHM,
Superintendent.

The plaintiff offered and the court admitted in evidence United States Exhibit No. 3, being — time table No. 32 of The Atchison, Topeka and Santa Fe Railway Company, effective during the period covered by the declaration, the material parts of which are as follows:

Bill of Exceptions.

Second Class.				First Class.												
51		47	39	33	23	13	9	7		3	1	Speed Limit.	Time Zone.	TIME TABLE No. 32. November 6, 1910.	Distance from Chicago.	Distance between Stations.
Fig. Passen.		Pass. Express.	Fast Passen.	Pass. Exp. and Fast Freight.	Fast Mail.	Pass. Express.	Daily Fast Mail and Express. Pass. Exp.	Mail and Express.	Fast Mail and Express.	Limited Express.	Limited and Continental Express.					
Leave Daily St. Paulay.		Leave Daily St. Paulay.	Leave Daily.	Leave Daily.	Leave Daily St. Paulay.	Leave Daily St. Paulay.	Leave Daily.	Leave Daily.	Leave Daily.	Leave Daily.	Leave Daily.	Ex. Sun.		STATIONS		Miles.
					AM 7.50	PM 1.05	AM 8.10	AM 7.45	PM 6.00	PM 5.00	PM 10.00	1402		CHICAGO.	M	
														1.2		
														C. & W. I. JUNC.		1.2
														0.0		
		PM 1.15		PM 7.50									W F T	18TH ST. YARD.		
														0.1		
														Street Arcade Crossing.		1.2
														0.7		
														HALSTED STREET.		5.0
														1.1		
														DRAWBRIDGE.		3.3
														1.8		
														Pathside Crossing.		1.1
														1.5		
														Ill. Northern Ry. Crossing.		1.0
														On 1		
AM 6.40			PM 12.40									178	W F T	CORWITH.	M	6.0
														0.2		
		9.10												CORWITH JUNC.		6.1
														1.2		
														Belt Crossing.		11.6
														0.1		
6.55		9.19	12.45	7.30	f 8.18	f 1.20	9.25	8.00	6.18	6.15	10.18	30 Mls		NERSKA.	M	11.6
7.28		9.33	1.15	7.45	f 8.26	f 1.28	9.32	8.07	6.26	6.22	10.25	110		5.2		15.5
														McCOOK.	M	
														0.2		
														C. & C. T. Crossing.		17.0
7.40					f 8.30	f 1.32								1.0		
												30 Mls		GARY.		16.5
7.55		9.45	1.27 1.45	8.00	f 8.35	f 1.38	9.38	8.12	6.32	6.28	10.31	180	W	5.7		
														WILLOW SPRINGS.	M	22.1
					f 8.38	f 1.40								1.0		
												40		SANTA FE PARK.		23.1
8.10					f 8.41	f 1.43								1.4		
												8		STERNEVILLE.	d p	24.5
8.30		10.00	2.05	8.20	8.47	1.47	9.45	8.19	6.39	6.37	10.38	185		2.0		
														TEDENS.	a p	27.5
8.45														1.7		
9.00		10.05	2.10	8.25	s 8.52	s 1.51	9.47	8.21	6.41	6.39	10.41	20		LEMONT.	D	29.1
9.25														4.3		
9.35		10.15	2.30	8.37 9.01	s 8.59	s 1.58	9.55	8.28	6.47	6.45	10.46	110		ROMEO.	M	33.4
														2.5		
10.15		10.22	2.50	9.15	s 9.04	s 2.06	9.55	8.30	6.51	6.51	10.51	25		LOCKPORT.	D	35.9
														4.5		
10.30 AM		10.40 PM	3.10 PM	9.30 PM	s 9.15 AM	s 2.15 PM	10.05 AM	s 8.39 AM	s 7.00 PM	s 9.02 PM	11.00 PM	250	W F T	JOLIET.	M	40.4
Arrive Daily St. Paulay.		Arrive Daily.	Arrive Daily.	Arrive Daily.	Arrive Daily St. Paulay.	Arrive Daily St. Paulay.	Arrive Daily.	Arrive Daily.	Arrive Daily.	Arrive Daily.	Arrive Daily.					
(11.3)		(10.6)	(11.6)	(10.3)	(29.1)	(30.1)	(28.3)	(26.4)	(21.6)	(19.9)	(21.6)	..... Average speed per hour.				

DOUBLE TRACK between Chicago and Joliet.

Rules governing the movement of trains with current of traffic on double track by means of Block Signals:

On double track, trains will run with current of traffic by block signals, whose indications will supersede time-table superiority.

All trains shall keep to the right.

The movement of trains will be supervised by train dispatcher, who will issue instructions to signalmen when required.

Trains having work to do which may detain them must obtain permission from signalman at the last station at which there is a siding before entering the block in which work is to be done. Signalman must obtain authority to give this permission from the dispatcher.

When necessary to run trains against the current of traffic, movement must be controlled by train orders

Except as affected by these rules, Block Signal and train rules remain in force

NOTE.—Illinois Division Time Table gives Trains no right east or Nerska.

All Conductors and Enginemen will be governed by time, rules and regulations of C. & W. I. R. R. Co. between Chicago and C. & W. I. Junction.

All Conductors and Enginemen will be governed by Chicago Terminal correct time table between C. & W. I. Junction and Nerska.

All trains will register by force 903 at Van Buren Street Office, Joliet.

All Passenger trains must get Clearance Cards before leaving Dearborn Station, Chicago. All westbound freight trains must get Clearance Cards before leaving Corwith and 18th street yard.

All trains discovering Automatic Signal at danger, must stop, wait one minute, and proceed through block under caution, reporting to Trainmaster at first convenient telegraph office, condition of track and block.

All trains will reduce speed to twenty (20) miles per hour over Canal Bridge, new line, Joliet.

.THE FOLLOWING SIGNS INDICATE.—

S—Regular stop; f—Stop on signal; ¶—Stop for meals; N—Day and night telegraph office; G—Night telegraph office; D—Day telegraph office; p—Day and night telephone office; d p—Day telephone office; n p—Night telephone office· W—Water station; F—Fuel station; T—Turn table, Y—Wye.

Gov't Exhibit No. 32.

Testimony of E. Hillhouse.

25 The telephone was in the same room with the telegraph instrument. The telephone was not connected with dispatcher's office at Chillicothe.

Corwith is not on the main line of The Atchison, Topeka and Santa Fe Railway Co.; it is located on a side-track nearly a half mile south of the main track. The side-track leaves the main line at Corwith Junction. On a single track, first class trains have right of track over second and third; a first class train is a passenger train; second and third class are freights. But under double track rules, all trains move in the current direction of traffic keeping on the right hand side. If a freight is on a track ahead of a passenger train and the passenger train catches up, the clearance order requires the freight train to clear the passenger train on time. The object of a clearance order is to make the second class train get out of the way of the first class train when they are both going in the same direction. That is the purpose of clearance orders given for No. 39 and 51. Train 33 makes up at 18th Street, Chicago. Only in exceptional cases does train 33 get an order at Corwith. There does not any passenger train get orders at Corwith; passenger trains go by a half mile away. Corwith takes no orders for them whatever. Train 51 leaves at 6:45 a. m. 39 is due to leave at 12:40 p. m. and 39 is always run out of there as an extra which gives them the right to get out before 12:40. The clearance order for train 39 comes about 11:30 a. m. No passenger train makes up at Corwith. Most of the messages I get during the day are what might be called "pick-up" messages. They give instructions to send cars to different places; a stock car for loading or a box car for loading. They would be messages telling how many cars to put in a train when making up the train; showing into whose train the cars are to be put. The clearance orders would be only one or two a day, at 6:45 a. m. and 11:30 or 11:40 a. m. When I said I got messages all during the day, I meant regarding the distribution of empty cars, and putting cars into trains, and I did not mean that I got clearance orders all during the day. I testified as to the ordinary custom at Corwith on the 26th, 27th and 28th of January but I did not work there on those days. I was not subpœnaed in this case. I got instructions to come up here from our agent.

Testimony of W. E. Sargent.

26 W. E. SARGENT, a witness on behalf of the United States of America, being duly sworn, testified as follows:

Direct Examination by Mr. Parkin.

I reside at Chicago, and am a telegraph operator for the A. T. & S. F. Ry. Co. On Jan. 26th, 1909, I was employed by that company at Corwith, Ill. as a telegraph operator. The principal messages were regarding the movements of cars. I worked at Corwith, Ill. that day which was the first time in the past two years. Previous to that time I had been employed at Corwith for four years. On the 26th of January I was at Corwith. I went on duty at 6:30 in the morning

and went off duty at 12 o'clock noon, and remained off until 3 o'clock p. m. and I went on duty at 3 o'clock p m. and remained on duty until 6:30 p. m. of the same day. My recollection is that I handled a message concerning movement of train 39. My recollection is that I gave a clearance card to 39 as 39's extra. A clearance card would authorize 39 to proceed as 39 or extra 39, whichever way they cleared, out on the main track. 39 runs to Fort Madison, Iowa. When she got the clearance card she would leave Corwith and go over the stub track to the main line, going around the "Y."

(Witness identifies Government's Exhibit 3.) The letter "N" is explained in the time table; it means (reading from time table) day and night telegraph office. The rule of the Company in force at the time covered by the Declaration is as follows: "All Passenger trains must get Clearance Cards before leaving Dearborn Station, Chicago. All westbound freight trains must get Clearance Cards before leaving Corwith and 18th street yard."

These clearance orders were received over the wire. I do not remember of any extras being made up at Corwith on the 26th of January, 1909.

Cross-Examination by Mr. Coleman.

The clearance card gives the train a right to move; it could not move out of the terminal without the card. By terminal, I mean Corwith. I went on duty at 6:30 in the morning and worked until noon. At noon I cut out the instruments so there was no connection and laid off and went out of the office and stayed away until 3 p. m. During that time there could be no communication between the office at Corwith and the train dispatcher at Chillicothe or between Corwith and any other office. The train dispatcher alone can issue a train order. There is only one train dispatcher. All train orders were received from the train dispatcher located at Chillicothe, Ill. over the telegraph wire at Corwith. I did not open the office until 3 o'clock p. m. and then I only worked until 6:30 at night and then quit; that was the last day I was at Corwith.

Testimony of W. E. Sa gent.

27

(Witness identifies defendant's exhibit No. 1. (Rec., p. ——)) I have seen it before; it was at Corwith office tacked on the wall; I read it there. I did not use the 'phone in the office; the telephone is not connected with the dispatcher's office.

F. M. ELLIOTT, a witness on behalf of the United States, being duly sworn, testified as follows:

Testimony of F. M. Elliott.

Direct Examination by Mr. Parkin.

I reside at Fort Madison, Iowa. On the 27th of January, 1909, I was telegraph operator for The A. T. & S. F. Ry. Co. I was not working regularly then but I worked at Corwith on, I think, the 27th and 28th of January. On the 27th I went on duty at 7:20 in the morning. I left Corwith office at 6:30 that night. From noon until

3 p. m. of that day I did not work but the rest of the time I worked as an operator. Most of the work was handling reports of cars and other reports. I remember sending order 21, which reads as follows: "C. & E. Extra, 581. Clear number 13 on time. Clear second number 9, six hours and 10 minutes late." The order was given to extra 581, an interstate freight train west bound from Corwith. I do not remember order No. 12.

38 Train order No. 21 was admitted in evidence marked Government's Exhibit 5, being in words and figures as follows:

Government Exhibit 5.

Form 19		Form 19
	(Form 938 Standard)	
To	Santa Fe	
To C. & E. X 581	Train Order No. 21	
To	Jan. 27, 1909.	
To	At Corwith	
To	Station	

X..... Opr. .....M

Clear No. 13 on time and clear second 2 and No. 9 six hours and 10 minutes late

R. H. A.

Conductor and Engineman Must Both Have a Copy of This Order

Made Comp. Time 11:37 A. M. Elliott Opr.

Testimony of M. Elliott.

On the following day, the 28th, I went on duty at 6:30 a. m. and quit at 6:30 p. m. Between noon and 3 p. m. I was not on duty and was not at my key. I went off duty and left the office between 12 noon and 3 p. m. and came back on duty at 3 p. m. and stayed until 6:30 p. m. I remember train order No. 10 but I don't think I received it. Order No. 11 I received and delivered; it is addressed to the conductor and engineer of train 51. Order No. 20 on the 28th I remember also; I received it over the wire from the train dispatcher at Chillicothe. It was delivered to interstate train extra 594 by me. The same is true of order No. 11; also order No. 20; both these orders were delivered to freight trains. No. 51 is a local train.

Said documents were admitted in evidence as Government's Exhibits No's. 6 and 7, and are respectively in words and figures as follows:

29 GOVERNMENT'S EXHIBIT NO. 6.

Form 19 : : Form 19 : Government Exhibit No. 6.

(Form 938 Standard)

To : Santa Fe

To C. & E. X 594 : Train Order No. 20

To : Jan. 28, 1909

To : At Corwith

To : Station

X——————Opr. ———M

Clear No. 13 on time

R. H. A.

Conductor and Engineman Must Both Have a Copy of This Order

Made Comp. Time 11:52 A. M. Elliott Opr.

Form 31 : GOVERNMENT EXHIBIT NO. 7. : Form 31 : Government Exhibit No. 7.

(Form 934 Standard)

To : Santa Fe

To : Train Order No. 11

To C. & E. No. 51 : Jan. 28, 1909.

To : At Corwith

To : Station

30 X Elliott Opr. ————M. Government Exhibit No. 7.

Clear 1st class trains on time.

R. H. A.

O. K. 6:42 a.

Conductor and Engineman Must Both Have a Copy of This Order

Repeated at M.

Conductor	Train	Made	Time	Operator
Cleveland	51	Camp	6:42 a	Elliott

Testimony of F. M. Elliott.

I received these orders over the wire in the telegraph office at Corwith and copied them by hand. I do not remember of any other orders or clearances given that day. I think train No. 33 does not run through Corwith. I was relieved each evening at 6:30 by Mr. Flaherty.

Cross-Examination by Mr. Coleman.

I went on duty at 7:20 a. m. on the 27th of January. I came in on No. 2 and they let me off at Corwith Junction and I got over to Corwith about 7:20. I worked until noon; then I closed the office up and disconnected; shut off all the instruments until 3 o'clock. I went away until 3 o'clock and at 3 o'clock I came back and resumed work and worked until 6:30 p. m. The next day I started in at 6:30 in the morning and worked until 12 o'clock noon; then cut out the instruments and stopped for three hours. At 3 o'clock p. m. I went on duty and worked until 6:30 p. m. From noon to 3 o'clock I closed the office and shut off all the instruments. Those were the only two days I worked at Corwith. Most of the messages I handled were reports of cars. They were not all orders from the train dispatcher affecting a train; only a very few were and those I identified for the attorney for the Government.

(Witness identifies defendant's exhibit No. 1 (See Rec p ——)). I have seen that at the Corwith office. It was on the wall in the office while I was working on Jan. 27th and 28th. All messages regarding or affecting the movement of trains must come from the dispatcher of the Illinois Division. The dispatcher's office of the Illinois Division is at Chillicothe, Ill.

Testimony of F. M. Elliott. 31

Re-direct Examination by Mr. Parkin.

The dispatcher's office at Chillicothe, Ill., covers the Illinois Division, which runs from Chicago to Fort Madison, Iowa. The messages I identified originated in the dispatcher's office at Chillicothe and all messages affecting trains originate there. There was no other train dispatcher's office on the Illinois Division. All orders affecting train movements which I delivered originated there. No. 2 stopped for me that morning at Corwith Junction to let me off. Flaherty was in the building the morning I arrived there.

Re-cross Examination by Mr. Coleman.

Train No. 2 stopped at Corwith Junction; that is where the spur leaves the double track—the main line. No. 2 never went to Corwith at all. All messages relating to train movements that I got at Corwith came from the dispatcher's office and the only ones that did come I identified for Mr. Parkin.

WILLIAM McCARTER, a witness on behalf of the United States, being first duly sworn, testified as follows: Testimony of William McCarter.

Direct Examination by Mr. Parkin.

I reside in Chicago and am Assistant Agent for The A. T. & S. F. Ry. Co. at Corwith. Corwith is a transfer station between 38th and 47th streets on Central Park Avenue. It is one of the large freight terminals—transfer yards and track. It is off the main line and connects at Corwith Junction.

Cross-Examination by Mr. Coleman.

(Witness identifies defendant's exhibit No. 1. (See Rec p --)) I saw that on the wall of the telegraph office at Corwith; it was there on the 25th of January, 1909 and at all times thereafter It is signed by C. B. Strohm, Superintendent of Terminals for The A. T. & S. F. Ry. Co.

Mr. Parkin: The Government rests.

32 H. B. FORSYTHE, a witness on behalf of the defendant, being duly sworn, testified as follows: Testimony of H. B. Forsythe.

Direct Examination by Mr. Coleman.

My name is H. B. Forsythe. I am 36 years old and reside at Chillicothe, Illinois. I am train dispatcher for The A. T. & S. F. Ry. Co. at Chillicothe, Ill. for the Illinois Division. I have been train dispatcher off and on for nearly nine years at this place and am now train dispatcher. I was so employed on Jan. 25, 1909 and at all times thereafter Chillicothe is the dispatcher's office for the Illinois Division. We have a double track road between Chicago and Toluca, Illinois. The train dispatcher's duty is to issue instructions with reference to the movement of trains, to keep a record of the arrival and departure of the different trains at the different stations and to issue the necessary instructions relative to their movement. These instructions are issued to conductors and engineers of the trains through the operators. A message is sent over a telegraph instrument from the dispatcher's office; it is received by the operator at the receiving station on his manifold, either a form 19 or a form 31 order as it may be. If it is a 19 order the operator's signature alone completes the order; if it is a 31 order, then it must be signed by the conductor and the engineer of the train to whom it is addressed. When we give an order to the operator, he repeats it back and I record it in the book. He then repeats it back and I underscore it to show that he has it exactly as I sent it. There is only one train dispatcher's office on a division for the reason that if there were two their orders would conflict. The ordering of the trains which are passing each other all going in the same direction must be governed by one man.

That one man on the Illinois Division is the dispatcher at Chillicothe, Illinois. That office is open and continuously operated day and night. There is always a train dispatcher at Chillicothe in control of the wire. In the train dispatcher's office at Chillicothe, there is a notice posted telling the dispatcher then on duty the office hours of every station he might have to send a message to, and that notice is always before the dispatcher. The office hours at Corwith were from 6:30 a. m. to 12 noon; the office was closed from 12 noon to 3 p. m. and was open from 3 p. m. to 6:30 p. m. The office was
33 open from 6:30 p. m. until midnight and then was closed from midnight until 3 a. m. and then at 3 a. m. the office was open
Testimony of E. H. Forthe. until 6:30 a. m. This was true on the 25th of January, 1909, and ever since.

Cross-Examination by Mr. Parkin.

The train dispatcher is the nerve center of the system, which he has under his control. The nerves are the telegraph wires running out from him to each station on the road. When I say there is only one train dispatcher that means purely and simply that there is only one man who has control of the issuing of train orders to the entire system or division under his control. That one man in charge of the system or division prepares and transmits or has transmitted under his direction to each office the appropriate order necessary at that office for the movement of trains there. That was true with reference to Corwith during the period covered in this case. The notice of the office hours at Corwith which I testified to was put into effect March 4th, 1908. I am not chief dispatcher at Chillicothe. I am train dispatcher at the present time. I work 8 hours a trick as do all the dispatchers in that office. The initials "R. H. A." signed to the train orders stand for R. H. Allison, who is train master at Chillicothe, Illinois. All orders issued out of the train dispatcher's office are signed in the name of the train master. The train master is R. H. Allison.

Mr. Coleman: The defendant rests.

Mr. Parkin: The plaintiff rests.

The foregoing was all the evidence offered and introduced by either party upon the trial of said cause.

Thereupon, at the close of the evidence, counsel for the United States moved the Court to dismiss the second, fourth and sixth counts of the declaration against the said defendant, which motion was granted by the Court.

Thereupon the defendant, by its counsel, then and there moved the Court, upon all the evidence introduced before the jury, as aforesaid, to direct the jury to return a verdict of not guilty upon the remaining counts of said declaration; and as grounds for said motion, suggested and presented to the Court the following: That the pleadings and the evidence introduced before the Court do not show, or tend

to show any commission by said defendant of said alleged offenses charged in said declaration, or any or either of them; that the
34 pleadings and the evidence before the Court and jury are not sufficient to justify or sustain a verdict of guilty upon said declaration, or any count thereof, because the same fails to show any violation of the "Act to promote the safety of employes and travelers upon railroads by limiting the hours of services of employes thereon," approved March 4th, 1907, effective March 4th, 1908, 34 Statutes at Large, Page 1415. Request for instructions to jury.

Which motion was over-ruled and denied by the Court on April 21, 1909; to which ruling of the Court, defendant, by counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 2, vi.:

No. 1. The Court instructs the jury to find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 2, viz.:

No. 2. The jury are instructed as a matter of law, under the pleadings and evidence in this case, that Corwith was not a tower, office, place or station continuously operated night and day.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 3, viz.:

No. 3. The jury are instructed that unless you find that the defendant at the time mentioned in the petition required or permitted an operator, train dispatcher or other employe who by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements in a tower, office, place or station continuously operated night and day, to be or remain on duty for a longer period than 9 consecutive hours in any 24-hour period you must find the defendant not guilty. If you find that said defandant required or permitted said employe to be or remain on duty from 6:30 A. M. to 12 o'clock noon, and then required said employe to go off duty until 3 P. M. and then required or permitted said employe to again go on duty from 3 P. M. until 6:30 P. M. then you must find the defendant not guilty; or if you find that said defandant required or permitted said employe to
35 be or remain on duty from 6:30 P. M. to 12 midnight, and then required said employe to go off duty until 3 A. M. and then required or permitted said employe to again go on duty from 3 A. M. until 6:30 A. M., then you must find the defendant not guilty. Request for instructions to jury.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 4, viz.:

No. 4. The Court instructs the jury that the words "continuously operated night and day" are to be construed in their ordinary acceptation. The word "continuously" means without cessation, interruption or intermission and qualifies the word "operated," and you are therefore instructed that the phrase "continuously operated night and day" refers to those stations on the railroad which would be operated without cessation, interruption or intermission either day or night.

And you are further instructed that if the evidence shows that during the time specified in the petition in this case for a space of time the station at Corwith was not under the law in question operated continuously day and night, or was operated only a part of the day time and a part of the night time, or that there was a cessation, interruption or intermission in its operation as a tower, office, place or station from which any operator, train dispatcher or other employe of said defendant during the time specified in the petition in this case, by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements of this defendant, then such station of Corwith was not one continuously operated night and day and the defendant would be under no obligation to limit the time during which it should allow its employes to be or remain on duty to nine hours in any 24-hour period, and you must, under the pleadings and evidence in the case, find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 5, viz:

Requests for instructions to jury.

No. 5. The jury are instructed that this suit though civil in form is in its essence and nature criminal. The jury, are therefore, 36 instructed that the law presumes the defendant innocent, and the United States must prove by competent evidence every essential element of the crime charged, beyond all reasonable doubt, to the satisfaction of each and every juror, and unless that has been done you should find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 6, viz.:

No. 6. The burden of proving the guilt of the defendant rests upon the United States throughout the trial.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instructions, No. 7, viz.:

No. 7. The jury are instructed that in arriving at a verdict in this case, you are the sole judges of the facts and of the credibility of each and every witness introduced in this case. It is the Court's duty to instruct you as to the law, but as to the facts you are the sole judges, and you have a right to disregard any opinion on the facts which the Court may have expressed.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 8, viz.:

No. 8. The jury are instructed that the burden of proof is upon the United States to show that Corwith was on the dates alleged a tower, office, place or station, of this defendant, from which any operator, train dispatcher or other employe of defendant by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements of this defendant, continuously operated night and day, and unless the United States proves that said Corwith was such a tower, office, place or station of this defendant continuously operated night and day, you must under the pleadings and evidence find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

37 Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 8-a, viz.: Requests for instructions to jury.

No. 8-a. The Court instructs the jury that the burden is upon the United States of America to prove that Corwith station is a station continuously operated night and day and that the said defendant permitted a telegraph operator to be or remain on duty for a longer period than 9 hours in any 24-hour period in such station, and you are further instructed that the law does not require that the 9 hours during which it is permissible for a railway company to require or permit an operator to be or remain on duty, must be consecutive hours; but the only obligation upon said railway company at such station is to refuse to allow or permit a telegraph operator to remain on duty at such station for more than 9 hours in any 24-hour period.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 8-b, viz.:

No. 8-b. You are further instructed that you are not to consider any employe as being on duty during the three hours from 12 noon to 3 P. M. or from 12 midnight to 3 A. M.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 9, viz.:

No. 9. The jury are instructed that if you find Corwith station was a station continuously operated day and night, and if you find the defendant required or permitted the said employes to be and remain on duty for nine hours in a twenty-four hour period, then you are further instructed that such nine hours need not be consecutive, and if said defendant required or permitted said employes to be and remain on duty not longer than nine hours in any twenty-four period, then you must find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 10, viz.:

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No. 10. The jury are instructed that if you find Corwith station was a station operated only during the daytime, and if you find the defendant required or permitted the said employes to be and remain on duty for nine hours in a twenty-four hour period, then you are further instructed that such nine hours need not be consecutive and if said defendant required or permitted said employes to be and remain on duty not longer than nine hours in any twenty-four period, then you must find the defendant not guilty.

You are further instructed that as a matter of law the word "daytime" may include any time during a day of twenty-four hours, whether before or after nightfall or sunrise, or both before and after sunrise or nightfall.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 11, viz.:

No. 11. The jury are instructed that if you find Corwith was a station operated only during the daytime, then the law permits the defendant to require and permit said employes to be and remain on duty for thirteen hours in any twenty-four hour period and under the pleadings and evidence in the case you must find the defendant not guilty.

You are instructed that as a matter of law the word "daytime" may include any time during a day of twenty-four hours, whether before or after nightfall or sunrise, or both before and after sunrise or nightfall.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 12, viz.:

No. 12. The jury are instructed that if you find Corwith was a station not operated continuously night and day and not operated only during the daytime, then the law allowed the defendant to require and permit said employes to be or remain on duty for a period

not longer than sixteen consecutive hours, and under the pleadings and evidence in the case you must find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 13, viz.:

39 No. 13. You are instructed that under the pleadings and evidence in this case, you are not to consider the hours from 12 noon to 3 P. M. and from 12 midnight to 3 A. M. as hours during which said employes were permitted or required by said defendant to be or remain on duty, and in computing the time said defendant required or permitted said employes to be or remain on duty you must exclude the hours from 12 noon to 3 P. M. and from 12 midnight to 3 A. M.

Requests for instructions to jury.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 14, viz.:

No. 14. The jury are instructed that under the law you have no authority in this suit to find the defendant guilty on more than one count of the petition of the United States, and if you find the defendant guilty you must state in your verdict under which count you so find, and you must find the defendant not guilty on all counts but the one on which you find it guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 15, viz.:

No. 15. The Court instructs the jury that if you find that Corwith station was not a station continuously operated day and night and that it was not a station operated only during the daytime, then you are instructed that the defendant is guilty of no violation of the law unless it permits an employe to be or remain on duty for a longer period than 16 consecutive hours, and you must find the defendant not guilty.

The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Thereupon counsel for defendant requested the Court to give the jury the following instruction, No. 16, viz.:

No. 16. The jury are instructed that you must consider the issues submitted to you in this case, precisely as though they were issues between private parties unknown to you. You must have no prejudice for or against either party, and you must show no favor to either party. You must weigh the evidence and find the facts, sensibly and honestly in this case, putting aside sentiment and prejudice.

40 The Court refused so to instruct or charge the jury; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

The Court's instruction to the jury.

Whereupon the Court gave the following instruction to the jury:

The Court: (Addressing the jury) The Court directs you to return a verdict finding the issues in this case for the plaintiff on the first, third, fifth and seventh counts of the petition.

Mr. Coleman: I wish to save an exception to the ruling of the Court in giving such instruction to the jury.

The Court: Exception.

Mr. Coleman: And may the record show an exception to each instruction refused.

The Court: Yes.

Mr. Coleman: And let the record show an exception to the rejection of the defendant's instructions submitted to Your Honor.

The Court: Yes.

Whereupon the jury returned into open court their written verdict in said case finding the defendant, The Atchison, Topeka and Santa Fe Railway Company, guilty as charged in the first, third, fifth, and seventh counts of the petition.

And thereafter on the same day the defendant, by counsel, moved the Court for a new trial, which was refused by said Court, to which ruling of the Court defendant, by its counsel, then and there duly excepted.

And thereafter on the same day the defendant, by counsel, moved the Court in arrest of judgment, which motion was overruled by the Court, to which ruling of the Court defendant, by its counsel, duly excepted.

And thereupon on the same day the District Court entered said verdict and then and there rendered final judgment thereon in favor of the plaintiff, the United States of America, and against the defendant, The Atchison, Topeka and Santa Fe Railway Company for the penal sum of $100 and costs, to all of which the said defendant duly excepted at the time and in open court.

And thereupon on the same day the Court also entered of record an order allowing said defendant 50 days from said date in which to present and file its bill of exceptions in said cause, and fixed the amount of bond for writ of error in the sum of $750.

41 And the foregoing is all the evidence given or received or offered or admitted at the trial of this cause; and such proceedings were had and such objections to evidence and such offers of evidence, and such motions, and such requests for instructions, and such refusal of instructions requested, and such rulings by the Court were made, and such instructions were given, and such exceptions were taken and saved, at the respective times of the several rulings and actions excepted to as herein indicated in the foregoing pages.

Bill of exceptions, filed May 28, 1909.

And forasmuch as the matters and things above set forth do not fully appear of record, the said defendant, The Atchison, Topeka and Santa Fe Railway Company, presents this, its Bill of Exceptions in

said cause, and prays that the same may be signed and sealed and made of record in this cause, by this Honorable Court, pursuant to the law in such cases.

Which is accordingly done and ordered by the Court on this 28 day of May, A. D. 1909.

KENESAW M. LANDIS
Presiding Judge of said District Court.

Endorsed: 10148. District Court of United States Northern District of Illinois—Eastern Division. United States of America vs. The Atchison, Topeka and Santa Fe Railway Co. Bill of Exceptions. Filed May 28, 1909. T. C. MacMillan, Clerk. Robert Dunlap, Lee F. English, James L. Coleman, Attys. for deft.

And afterwards, to wit, on the 3rd day of June, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors, same being in the words and figures following, to wit:

42 IN THE DISTRICT COURT OF THE UNITED STATES

Assignment of errors, filed June 3, 1909.

Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Defendant.
No. 10148.

ASSIGNMENT OF ERRORS.

And now comes the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation of the state of Kansas, by Robert Dunlap, Lee F. English and James L. Coleman, its attorneys, and in connection with its petition for a writ of error herein says that in the record and proceedings and during the trial of the above entitled cause and in the said judgment in the said District Court error has intervened to its prejudice, and this defendant here makes the following Assignment of Errors upon which it will rely in the prosecution of the writ of error in the above entitled cause, to-wit:

1. The District Court erred in overruling and denying and in not granting the motion of defendant to instruct the jury to find the defendant not guilty.

2. The District Court erred in refusing to instruct the jury to find the defendant not guilty.

3. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 1. The Court instructs the jury to find the defendant not guilty.

4. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 2. The jury are instructed as a matter of law, under the pleadings and evidence in this case, that Corwith was not a tower, office, place or station continuously operated night and day.

5. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

43 Requested Instruction No. 3. The jury are instructed that unless you find the defendant at the time mentioned in the petition required or permitted an operator, train dispatcher or other employe who by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements in a tower, office, place or station continuously operated night and day, or be or remain on duty for a longer period than 9 consecutive hours in any 24-hour period you must find the defendant not guilty. If you find that said defendant required or permitted said employe to be or remain on duty from 6:30 A. M. to 12 o'clock noon, and then required said employe to go off duty until 3 P. M. and then required or permitted said employe to again go on duty from 3 P. M. until 6:30 P. M. then you must find the defendant not guilty; or if you find that said defendant required or permitted said employe to be or remain on duty from 6:30 P. M. to 12 midnight, and then required said employe to go off duty until 3 A. M. and then required or permitted said employe to again go on duty from 3 A. M. until 6:30 A. M., then you must find the defendant not guilty.

6. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 4. The Court instructs the jury that the words "continuously operated night and day" are to be construed in their ordinary acceptation. The word "continuously" means without cessation, interruption or intermission and qualifies the word "operated", and you are therefore instructed that the phrase "continuously operated night and day" refers to those stations on the railroad which would be operated without cessation, interruption or intermission either day or night.

And you are further instructed that if the evidence shows that during the time specified in the petition in this case for a space of time the station at Corwith was not under the law in question operated continuously day and night, or was operated only a part of the day time and a part of the night time, or that there was a cessation, interruption or intermission in its operation as a tower, office, place or station from which any operator, train dispatcher or other employe of said defendant during the time specified in the petition in this case, by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train

44 movements of this defendant, then such station of Corwith was not one continuously operated night and day and the defendant would be under no obligation to limit the time during which it

should allow its employes to be or remain on duty to nine hours in any 24-hour period, and you must, under the pleadings and evidence in the case, find the defendant not guilty.

7. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 8. The jury are instructed that the burden of proof is upon the United States to show that Corwith was on the dates alleged a tower, office, place or station, of this defendant, from which any operator, train dispatcher or other employe of defendant by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements of this defendant, continuously operated night and day, and unless the United States proves that said Corwith was such a tower, office, place or station of this defendant continuously operated night and day, you must under the pleadings and evidence find the defendant not guilty.

8. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 8-a. The Court instructs the jury that the burden is upon the United States of America to prove that Corwith station is a station continuously operated night and day and that the said defendant permitted a telegraph operator to be or remain on duty for a longer period than 9 hours in any 24-hour period in such station, and you are further instructed that the law does not require that the 9 hours during which it is permissible for a railway company to require or permit an operator to be or remain on duty, must be consecutive hours; but the only obligation upon said railway company at such station is to refuse to allow or permit a telegraph operator to remain on duty at such station for more than 9 hours in any 24-hour period.

9. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 8-b. You are further instructed that you are not to consider any employe as being on duty during the three hours from 12 noon to 3 P. M. or from 12 midnight to 3 A. M.

10. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested instruction No. 9. The jury are instructed that
45 if you find Corwith station was a station continuously operated day and night, and if you find the defendant required or permitted the said employes to be and remain on duty for nine hours in a twenty-four hour period, then you are further instructed that such nine hours need not be consecutive, and if said defendant required or permitted said employes to be and remain on duty not longer than nine hours in any twenty-four hour period, then you must find the defendant not guilty.

Assignment of errors, filed June 3, 1909.

11. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 10. The jury are instructed that if you find Corwith station was a station operated only during the day-

time, and if you find the defendant required or permitted the said employes to be and remain on duty for nine hours in a twenty-four hour period, then you are further instructed that such nine hours need not be consecutive and if said defendant required or permitted said employes to be and remain on duty not longer than nine hours in any twenty-four hour period, then you must find the defendant not guilty.

You are further instructed that as a matter of law the word "daytime" may include any time during a day of twenty-four hours, whether before or after nightfall or sunrise, or both before and after sunrise or nightfall.

12. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 11. The jury are instructed that if you find Corwith was a station operated only during the daytime, then the law *pre*mits the defendant to require and permit said employes to be and remain on duty for thirteen hours in any twenty-four hour period and under the pleadings and evidence in the case you must find the defendant not guilty.

You are instructed that as a matter of law the word "daytime" may include any time during a day of twenty-four hours, whether before or after nightfall or sunrise, or both before and after sunrise or nightfall.

13. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 12. The jury are instructed that if you find Corwith was a station not operated continuously night and day and not operated only during the daytime, then the law allowed the defendant to require and permit said employes to be or remain on duty for a period not longer than sixteen consecutive hours, and under the pleadings and evidence in the case you must find the defendant not guilty.

14. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 13. You are instructed that under the pleadings and evidence in this case, you are not to consider the hours from 12 noon to 3 P. M. and from 12 midnight to 3 A. M. as hours during which said employes were permitted or required by said defendant to be or remain on duty, and in computing the time said defendant required or permitted said employes to be or remain on duty you must exclude the hours from 12 noon to 3 P. M. and from 12 midnight to 3 A. M.

15. The District Court erred in refusing to give to the jury the following instruction asked for by the defendant:

Requested Instruction No. 15. The Court instructs the jury that if you find that Corwith station was not a station continuously operated day and night and that it was not a station operated only during the daytime, then you are instructed that the defendant is guilty of no violation of the law unless it permits an employe to be or remain

on duty for a longer period than 16 consecutive hours, and you must find the defendant not guilty.

16. The District Court erred in instructing the jury as follows:

The Court directs you to return a verdict finding the issues in this case for the plaintiff on the first, third, fifth and seventh counts of the petition.

17. The instruction of the District Court to the jury to find the defendant guilty is contrary to law.

18. The instruction of the District Court to the jury to find the defendant guilty is contrary to the pleadings and evidence in the case.

19. The verdict of the jury is contrary to law.

20. The verdict of the jury is contrary to the pleadings and evidence.

21. The District Court erred in overruling and denying and in not granting the motion of defendant for a new trial in said cause.

22. The District Court erred in overruling and denying and in not granting the motion of defendant in arrest of judgment in said cause.

23. The District Court erred in entering judgment and imposing a fine upon said verdict.

47 25. The fine imposed upon this defendant and the judgment of said Court entered thereon is contrary to law. Assignment of errors, filed June 3, 1909.

Wherefore said The Atchison, Topeka and Santa Fe Railway Company, by reason of the errors aforesaid, prays that said judgment and fine against it, the said The Atchison, Topeka and Santa Fe Railway Company, may be reversed, set aside and held for naught.

ROBERT DUNLAP,
LEE F. ENGLISH,
JAMES L. COLEMAN,
Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company.

Endorsed: No. 10148. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America v. The A. T. & S. F. Ry. Co. Assignment of Errors. Filed June 3, 1909. T. C. MacMillan, Clerk. Robert F. Dunlap, Lee F. English, James L. Coleman, Attorneys for Defendant.

And afterwards, to wit, on the 3rd day of June, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition for Writ of Error, same being in the words and figures following to wit: Petition for writ of error, filed June 3, 1909.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America, *Plaintiff* *vs.* The Atchison, Topeka and Santa Fe Railway Company, *Defendant.*	No. 10148.

The Atchison, Topeka and Santa Fe Railway Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the 21st day of April, 1909, comes now by Robert Dunlap, Lee F. English and James L. Coleman, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable United States Circuit Court of Appeals for the Seventh Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals.

And your petitioner will ever pray.

ROBERT DUNLAP,
LEE F. ENGLISH,
JAMES L. COLEMAN,
Attorneys for Defendant

Endorsed: No. 10148. In the District Court of the United States for the Northern District of Illinois, Eastern Division. Petition for Writ of Error. United States of America vs. The A. T. & S. F. Ry. Co. Filed June 3, 1909. T. C. MacMillan, Clerk. Robert F. Dunlap, Lee F. English, James L. Coleman, Attorneys for Defendant.

And afterwards, to wit, on the 3d day of June, A. D. 1909, the following order was had and entered of record in said cause, to wit:

United States of America *vs.* The Atchison, Topeka and Santa Fe Railway Company.	No. 10148.

Upon motion of Robert Dunlap, Lee F. English and James L. Coleman, Attorneys for defendant, and upon filing a petition for a writ of error and bond on said writ of error in the sum of seven hundred and fifty (750) dollars and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed

in the United States Circuit Court of Appeals for the Seventh Circuit the judgment heretofore entered herein.

49 And afterwards, to wit, on the 28th day of May, A. D. 1909, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Writ of Error, same being in the words and figures following, to wit: Bond on writ of error, filed May 28, 1909.

Know All Men by These Presents, That we, The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, as principal, and Michael J. Collins, of Chicago, Illinois, as surety, are held and firmly bound unto United States of America in the full and just sum of Seven Hundred and fifty (750) Dollars, to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this twenty-eighth day of May, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division in a suit pending in said Court, between United States of America plaintiff, and The Atchison, Topeka and Santa Fe Railway Company, defendant, a judgment was rendered against the said The Atchison, Topeka and Santa Fe Railway Company, defendant and the said defendant, The Atchison, Topeka and Santa Fe Railway Company having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said The Atchison, Topeka and Santa Fe Railway Company shall prosecute its writ to effect, and shall answer all damages and costs

50 that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue. Bond on writ of error, filed May 28, 1909.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
(Seal) By E. P. RIPLEY,
President.

MICHAEL J. COLLINS, (Seal)
(Corporate Seal)
Attest. EDWARD MCBRIDE,
Its Asistant Secretary.

Sealed and delivered in presence of
N. W. WILLARD,
CHAS. JENSEN,
Approved by
KENESAW M. LANDIS,
District Judge.

Endorsed: No. 10148. United States Circuit Court, Northern District of Illinois. Eastern Division. United States of America vs. The Atchison, Topeka & Santa Fe Ry. Co Bond on Writ of Error. Filed May 28, 1909. T. C. MacMillan, Clerk.

United States of America } ss.

The President of the United States, To the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The Atchison, Topeka and Santa Fe Railway Company, a corporation of the State of Kansas, Plaintiff in Error, and United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said Plaintiff in Error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 3rd day of June, A. D. 1909.

T. C. MacMillan

(Seal) *Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.*

Allowed by

Kenesaw M Landis

District Judge

Northern District of Illinois,
Eastern Division, } ss.

Ret
to wr

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit a true and complete transcript of the record and proceedings in the foregoing entitled cause, this ninth day of June, A. D. 1909.

(Seal)

T. C. MacMillan
Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

(Endorsed) Writ of Error. Filed June 3, 1909 T. C. MacMillan, Clerk.

52 The Atchison, Topeka and Santa Fe Railway System.

Prae
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Railway Exchange, Chicago.

Law Department.

June 4, 1909.

Gardiner Lathrop,
General Solicitor.
Robert Dunlap,
Francis T. A. Junkin,
T. J. Norton,
General Attorneys.
Lee F. English,
James L. Coleman,
Assistant Attorneys.
Hon. T. C. MacMillan,
Clerk U. S. District Court,
Northern District of Illinois,
Eastern Division,
Federal Bldg., Chicago, Ill.

Dear Sir:—

Please furnish transcript of record in the case of The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, v. United States of America, Defendant in Error, consisting of the following.

(1) Petition of plaintiff;
(2) Praecipe for summons;
(3) Summons;
(4) Marshal's return;
(5) Plea (not guilty) of defendant;
(6) Order for jury to be empanelled;
(7)

(8) Verdict and judgment, including motion for new trial, overruled and exception, motion in arrest of judgment, overruled and exception;
(9) Bill of exceptions;
(10) Assignment of errors;
(11) Petition for writ of error;
(12) Order of court allowing same;
(13) Writ of Error;
(14) Return of writ of error;
53 (15) Bond of defendant on writ of error;
(16) Certificate of Clerk;
(17) Citation.

Yours truly,

DUNLAP, ENGLISH AND COLEMAN

Certificate of Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in Case No. 10148, wherein The United States of America is Plaintiff and The Atchison, Topeka and Santa Fe Railway Company is Defendant, prepared in accordance with praecipe filed herein and attached hereto, as same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 9th day of June, A. D. 1909.

T. C. MACMILLAN
Clerk.

(Seal)

Citation. 54 United States of America } ss.

The President of the United States, To United States of America, Edwin W. Sims, Attorney, Greeting:

You are hereby cited and admonished to be and appear at United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis, Judge of the District Court of the United States, this 3rd day of June in the year of our Lord one thousand nine hundred and nine.

KENESAW M. LANDIS
District Judge

Received a copy of the within and foregoing citation this 3rd day of June, A. D. 1909.

EDWIN W. SIMS
by W. A. S.
U. S. Attorney,
Attorney for Defendant in Error.

(Endorsed) Citation Filed June 3, 1909 T. C. MacMillan, Clerk.

55 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 54, inclusive, contain a true copy of the printed record, printed under my supervision, and filed July 12, 1909, on which this cause was argued, heard, and determined in the case of The Atchison, Topeka and Santa Fe Railway Company v. United States of America, No. 1610, October term, 1909, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for [SEAL.] the Seventh Circuit, at the city of Chicago, this sixteenth day of March, A. D. 1910.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

56 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room, in the city of Chicago in said Seventh Circuit, on the sixth day of October, one thousand nine hundred and eight, of the October term in the year of our Lord one thousand nine hundred and eight, and of our Independence the one hundred and thirty-third year:

And afterwards, to-wit, on the eleventh day of June, A. D. 1909, in the October term aforesaid, came the plaintiff in error, by its counsel, Mr. Robert Dunlap, Mr. Lee F. English, and Mr. James L.

Coleman, and filed in the office of the clerk of this court its certain appearance, which is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, plaintiff in error,
v.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

We hereby enter the appearance of The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error in the above entitled cause, and of ourselves as its attorneys.

ROBERT DUNLAP,
LEE F. ENGLISH,
JAMES L. COLEMAN,
Attorneys for Plaintiff in Error.

Endorsed: Filed June 11, 1909. Edward M. Holloway, clerk.

57 And afterwards on the same day, to wit, on the eleventh day of June, A. D. 1909, came the defendant in error, by its counsel, Hon. Edwin W. Sims, and filed in the office of the clerk of this court its certain appearance, which is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit.

No. 1610. October term, 1908.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., plaintiff in error,
vs.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

The clerk will enter my appearance as counsel for the defendant in error.

EDWIN W. SIMS,
U. S. Attorney.

Endorsed: Filed June 11, 1909. Edward M. Holloway, clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room, in the city of Chicago, in said Seventh Circuit, on the fifth day of October one thousand nine hundred and nine of the October term in the year of our Lord one thousand nine hundred and nine and of our Independence the one hundred and thirty-fourth year.

And afterwards, to wit, on the fifth day of October, A. D. 1909, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

58 Present: Hon. Peter S. Grosscup, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge; Edward M. Holloway, clerk; Luman T. Hoy, marshal.

Before Hon. Peter S. Grosscup, circuit judge; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge.

THE ATCHISON, TOPEKA & SANTA FE RAILway Company *vs.* UNITED STATES OF AMERICA.	1610. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on October 13, 1909.

And afterwards, to wit, on the thirteenth day of October, A. D. 1909, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, *October 13, 1909.*

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge; Edward M. Holloway, clerk; Luman T. Hoy, marshal.

59 Before Hon. Peter S. Grosscup, circuit judge; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge.

THE ATCHISON, TOPEKA & SANTA FE RAILway Company *vs.* UNITED STATES OF AMERICA.	1610. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Robert Dunlap, counsel for plaintiff in error, and by Mr. James H. Wilkerson, counsel for defendant in error, and the court, having heard the same, takes this matter under advisement.

And afterwards, to wit, on the fourth day of January, A. D. 1910, in the October term last aforesaid, there was filed in the office of the

clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

60 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1610. October term, A. D. 1909. October session, A. D. 1909.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, plaintiff in error, v. UNITED STATES OF AMERICA, DEFENDANT IN error.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker, and Seaman, circuit judges.

The writ of error is to reverse a judgment in favor of defendant in error, against the plaintiff in error, for the sum of one hundred dollars, together with costs, entered upon a verdict, upon instruction of the court, in favor of appellee on the first, third, fifth, and seventh counts of the declaration.

The suit was brought under the hours of service act, approved March 4th, 1907, United States Statutes at Large, Vol. 34, Part 1, p. 1415.

The facts are stated in the opinion.

GROSSCUP, circuit judge, delivered the opinion.

Section 2 of the hours of service act, applicable to plaintiff in error, a common carrier within the meaning of that act, provides:

"SECTION 2. It shall be unlawful for any common carrier, its officers, etc., to require or permit any employe subject to this act to be, or remain, on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has
61 had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.

Provided that no operator, train despatcher, or other employe who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, etc."

The charge alleged was that plaintiff in error required and permitted Fred Hillhouse, one of its telegraph operators despatching, reporting, transmitting, receiving, and delivering orders pertaining to and affecting train movements in interstate commerce, at Corwith, in the State of Illinois, to be on duty in such office, continuously operated day and night, for a longer period than nine hours, the proof showing that he went on duty at 6.30 o'clock a. m., was given an intermission of three hours at 12.00 o'clock noon, resumed duty at 3.00 o'clock p. m., and went off duty at 6.30 p. m., making in all nine hours of actual service, but twelve hours from the beginning thereof to the end thereof.

A like charge was made respecting requirements upon one W. E. Sargent and one F. M. Elliott, covering the same hours of service, but on different days.

Do these facts prove a violation of the act? The question is raised by appropriate exceptions to the instructions of the court and by the refusal of the court to give instructions offered by the plaintiff in error.

The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute, either is to be divided into "two periods," separated by the intermission (for which the statute makes no provision), or is to be considered as "one period," including the intermission, which would make it a
62 period of twelve hours. But manifestly Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employe's service, for the statute was enacted in view of the customs of the land, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word "period"—that "period" is "a term," "a cycle," something "continuous" between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

We cannot concur in this view. The statute was passed with custom as a background. According to custom, nine hours work unquestionably means nine hours actual employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new Western States, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly Congress did not intend to override these existing customs, making it necessary either that the railroad company should not give intermissions or that the employee should be paid notwithstanding the intermissions, and making it necessary at many stations (presumably well known to Congress) that the

railroad should either employ a different telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word "period," all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context and in the light of ordinary custom, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law it would be possible for the railroad company to require its operators to give their service for short periods at short intervals, say every alternate hour, or an hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision
63 in the act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that despatchers, being "employees," come under the protection of the main part of the section which gives to all employees "at least eight consecutive hours off duty" in each day, counting from some point in the next day.

The judgment of the District Court is reversed and the cause remanded, with instructions to grant a new trial.

A true copy.

Teste:

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

64 And afterwards on the same day, to wit, on the fourth day of January, A. D. 1910, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *January 4, 1910.*

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, circuit judge, presiding; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge; Hon. Christian C. Kohlsaat, circuit judge; Edward M. Holloway, clerk; Luman T. Hoy, marshal.

Before: Hon. Peter S. Grosscup, circuit judge; Hon. Francis E. Baker, circuit judge; Hon. William H. Seaman, circuit judge.

ATCHISON, TOPEKA & SANTA FE RAILWAY Company *vs.* UNITED STATES OF AMERICA.	1610. Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, it is now here ordered, and ad-
65 judged by this court that the judgment of the said District Court in this cause, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with instructions to grant a new trial.

66 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 10, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and stipulations relating thereto) in the case of The Atchison, Topeka and Santa Fe Railway Company *vs.* United States of America, No. 1610, October term, 1909, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for
[SEAL.] the Seventh Circuit, at the city of Chicago, this sixteenth day of March, A. D. 1910.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court
[SEAL.] *of Appeals for the Seventh Circuit, Greeting:*

Being informed that there is now pending before you a suit in which The Atchison, Topeka & Santa Fe Railway Company is plaintiff in error and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings

therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,
68 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and ten.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

69 UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, *vs.* The United States of America, defendant in error, is a full, true, and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for
[SEAL.] the Seventh Circuit, at the city of Chicago, this third day of May, A. D. 1910.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Indorsed:) File No. 22104. Supreme Court of the United States. No. 878. October term, 1909. The United States, petitioner, *vs.* The Atchison, Topeka & Santa Fe Railway Company. Writ of certiorari.

70 In the Supreme Court of The United States.
October term, 1909.

THE UNITED STATES, PETITIONER, *v.* THE ATCHISON, TOPEKA AND SANTA FE Railway Company.	No. 878.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the

return of the clerk of the Circuit Court of Appeals for the Seventh Circuit to the writ of certiorari issued herein.

LLOYD W. BOWERS,
Solicitor-General.
ROBERT DUNLAP,
Counsel for Respondent.

APRIL 28, 1910.

71 (Indorsement on cover:) File No. 22104. Supreme Court U. S. October term, 1910. Term No., 504. The United States, petitioner, vs. The Atchison, Topeka & Santa Fe Railway Company. Writ of certiorari and return. Filed May 6, 1910.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PETITIONER,
v.
THE ATCHISON, TOPEKA AND Santa Fe Railway Company, respondent. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF THEREON.

The United States respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause, reversing the judgment of the District Court for the Northern District of Illinois and remanding the cause, with instructions to grant a new trial.

THE CASE.

This was an action prosecuted in the District Court to recover certain penalties for violation of the act of Congress, entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat., 1415).

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The petition contained seven counts for seven alleged offenses under the proviso found in the second section of the act, each count stating, in similar terms, an alleged violation of the law. The section is as follows:

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be

permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

The material allegations in each count are that the Atchison, Topeka and Santa Fe Railway Company, a common carrier within the act, has an office and station at Corwith, Ill., and that on a certain day it required and permitted a telegraph operator and employee of said common carrier, who by the use of the telegraph dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting train movements in interstate commerce at Corwith, which said office and station was continuously operated night and day, to be on duty for a longer period than nine hours, to wit, in the first, third, fifth, and seventh counts from the hours of 6.30 a. m. to 6.30 p. m., and that during said period he was given an intermission of three hours, to wit, from 12 o'clock noon to 3 o'clock p. m., and in the second, fourth, and sixth counts from the hours of 6.30 p. m. to 6.30 a. m., and during said period he was given an intermission of three hours, to wit, from 12 o'clock midnight to 3 a. m., and that there was, at the time, no case of emergency, nor any case of casualty or unavoidable accident or act of God.

There was plea of not guilty and trial by jury.

There is no dispute as to the evidence. It was shown that the railroad station at Corwith was opened both night and day; that the official time card for the use of its employees showed that the station at Corwith was denoted "N," which indicates "day and night telegraph office." Corwith is in the outer limits of Chicago, about 6 miles from the center of the city, and the office in which the telegrapher works is located on a side track nearly half a mile south from the main track of the Atchison, Topeka and Santa Fe at Corwith Junction. It is admitted that, on the days mentioned, an operator went on duty at 6.30 a. m.; that at 12 o'clock noon he left the office, disconnected the switchboard, and was absent until 3 p. m., when he returned, opened the switchboard, connected the instruments, and remained at the office until 6.30 p. m., at which time another operator came on duty, remained at the office until 12 o'clock midnight, at which time the line was disconnected until 3 a. m., when the operator again resumed duty and remained until 6.30 a. m. This was the regular daily practice at this office.

The record shows that the telegraphers mentioned in the counts on which a verdict was ordered all handled messages relating to movement of interstate trains, and also shows an admission that defendant was, at all times above mentioned, "engaged in interstate commerce by railroad," and that at said times "there was no case of emergency, or casualty, or inevitable accident or act of God affecting the operation of Corwith station."

The record shows that the telegraph office was operated both day and night, except during certain stated hours during both day and night, and that such operation during day and night was continuous over each day and night covered by the times alleged in the declaration. (See record at top of p. 33.) The night operation of the office is shown by defendant's admission, page 18 (fol. 28) of the record. The day operation of the office is shown by the evidence. (Rec., p. 20 (fol. 31), p. 26 (fol. 36), p. 27 (fol. 37), p. 28 (fol. 38).)

At the close of the evidence the counsel for the United States moved to dismiss the second, fourth, and sixth counts, which motion was granted.

Under the instructions of the court, the jury returned a verdict of guilty upon four counts of the petition.

Motions for new trial and in arrest of judgment were overruled, and the court entered the verdict and rendered final judgment against the defendant for the penal sum of $100 and costs.

A writ of error was allowed to the Circuit Court of Appeals. That court reversed the judgment of the District Court and remanded the cause, with instructions to grant a new trial.

QUESTION PRESENTED.

The question presented by the reversal of the judgment of the District Court is:

Does the proviso fix a "period" of nine hours in any twenty-four-hour period beyond or outside the limits

of which period no service of telegraphers is permissible; or is the term "for a longer period than nine hours" to be construed to mean nine hours in the aggregate in any twenty-four-hour period?

The opinions of the District Court and the Circuit Court of Appeals are printed in full in the Appendix.

The District Court, construing the statute, held:

> That a twenty-four hour period is twenty-four consecutive hours, and that a nine-hour period is nine consecutive hours; [and concludes] that the nine-hour period during which the law authorized the day man to be at work expired at 3.30 p. m., and that inasmuch as he was required or permitted to be "on duty" three hours thereafter, the law has been violated. And so with respect to the night man.

The Circuit Court of Appeals reversed the judgment and held that the nine-hour period of duty was to be taken as nine hours in the aggregate; and that what the statute forbade was more than nine hours' actual employment in any twenty-four hours. The court said:

> The statute was passed with custom as a background. According to custom, nine hours' work unquestionably means nine hours' actual employment, whether broken by an intermission for lunch or on account of some other occasion.

The statute forbids the hours of labor to be more than nine in any twenty-four hours. It also fixes the

period of employment. When the period begins, the hours are to be counted from that time. They are then consecutive hours. It is immaterial whether the service is broken or unbroken within that time. That this was the intention of Congress appears from the use of this peculiar language, "for a longer period than nine hours in any twenty-four-hour period." The word is the same in each description. The twenty-four-hour period is a day, "a definite portion of time marked and defined by some recurring event." The nine-hour period is marked and defined in precisely the same way. If there had been an intention to express a different meaning, some other word or some qualification of this word would have been used. If, as is suggested, it was intended "to be or remain on duty for a longer period than nine hours in the aggregate," those words would have been used. Thus, in the provision relating to other employees of common carriers who have to do with the movement of trains, it is provided that they may not—

> be or remain on duty for a longer period than sixteen consecutive hours, * * * and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.

The hours of employment of telegraph operators are carefully distinguished from the employment of others provided for in the act. Trainmen are limited to sixteen hours, and telegraphers, who must in the

public interest be wide-awake and keen and vigilant for slight sounds and significant dots and dashes, are limited in their work to "a period of nine hours."

Out of a "twenty-four-hour period" there was carved a "nine-hour period" during which the employment of telegraphers was permissible. Mistakes in the transmission of train orders by telegraph had been a source of more or less frequent railway disasters. As one means of obviating such disasters, this law was enacted. The purpose of the act as outlined in its title was "To promote the safety of travelers" by limiting the hours of service of certain employees engaged in such connection with the movement of trains that excessive service tended to an incapacity which imperiled travel.

The Congressional intent is apparent from the words of the act, to make travel safer by preventing the exhaustion of men occupying critical positions in controlling train movements. This legislation was enacted with a view to the compulsory allowance of rest by requiring the service of telegraphers to be within a "period of nine hours."

The decision of the District Court interpreted the act to require all service of telegraphers in any twenty-four-hour period to be wholly within a "period of nine hours." The construction of the act by the Circuit Court of Appeals gave to the language of the act the interpretation that service was not permissible during any twenty-four-hour period for more than nine hours in the aggregate.

It is respectfully submitted that the writ of certiorari should issue.

PHILIP J. DOHERTY,
EDWARD A. MOSELEY,
Special Assistants to the Attorney-General.

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Solicitor-General.

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(1) The Circuit Court of Appeals decided the case on an alleged custom, there being no evidence adduced in the court below of any such custom. The court will not take judicial notice of a custom. Proof is required.

(2) Even if there were such custom, the statute is designed to break it up.

(3) The mischief which the statute was designed to remedy was this: The work of railroad telegraphers is one in which the public have a great interest. They must be alert and ready to act quickly in performing their functions. The legislation was designed to prevent them being so overworked that their sensibilities would be dulled and their quickness of intellect impaired. The construction given to the act by the court would permit the period to be broken up into, say, two-hour periods of work, with one-hour periods of rest intervening, each period of rest insufficient to permit continuous repose, thus annulling the effect of the statute. Such statutes are made in the public interest, and are to be given, if possible, a construction which will not destroy the efficacy of the act, but which will advance the remedy.

(4) The decision of which the Government complains makes practically inoperative the Federal act

regulating the hours of service of telegraphers, and this act makes inoperative all existing state legislation on the same subject. The latter point was expressly decided in—

State of Missouri v. *Mo. Pac. Ry. Co.* (111 S. W., 500).

Wisconsin v. *Chicago, M. & St. P. Ry. Co.* (117 N. W., 686).

Texas v. *Texas & N. O. R. R. Co.* (124 S. W., 984).

State v. *Northern Pacific Ry. Co.* (93 Pac. Rep., 945).

It is therefore contended that the importance of the controversy, the large number of railroads and of telegraphers throughout the whole country, whose interests and whose rights are really involved, the embarrassment resulting if the purpose of Congress to conserve safety of travel is not accomplished by this legislation, which suspends state legislation on the same subject, and the necessity for an authoritative interpretation of this act to define the rights and obligations arising under it, as a prevention of industrial controversy, are reasons which justify the Government in this application to the court for a writ of certiorari.

The Government contends that a case has been made for the interposition of this court by certiorari, and that "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Constr. Co.* v. *Jacksonville Ry.*, 148 U. S., 372, 384) in "such an exceptional case" it is within the power of the court to require by

certiorari the present case to be sent up for review and determination.

This may be done if in the judgment of the court an exigency exists for its interposition, by reason of the important public character of the question involved, although the case has not proceeded in the court below to final judgment.

The Conqueror (166 U. S., 110).

American Constr. Co. v. *Jacksonville Ry.* (148 U. S., 372).

Johnson v. *Southern Pacific Co.* (196 U. S., 1).

Harriman v. *Northern Securities Co.* (197 U. S., 244).

In *Forsythe* v. *Hammond* (166 U. S., 506, 514) this court said:

> We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. (*Chicago & Northwestern Railway* v. *Osborne*, 146 U. S. 354.) On the other hand, in *The Three Friends*, at the present term, *ante*, 1, we issued a writ of certiorari in a case appealed to the Circuit Court of Appeals before any action had been taken by that court.

In *Aspen Mining & Smelting Co.* v. *Billings* (150 U. S., 31, 37), in which the Circuit Court of Appeals had reversed a decree of the Circuit Court, this court said:

> If the Circuit Court of Appeals erred, or if, for any reason, its judgment could be held void, the appropriate remedy lay in a *certiorari* from this court to that court.

The decision in this case by the Circuit Court of Appeals is practically a final judgment, because, if it stands, no recovery by the Government is possible.

Under a similar statute certiorari was issued adverse to the Government in the case of *The Belt Railway Company of Chicago* v. *United States*, No. 632, October, 1909, and is now pending in this court.

The opportunity for rest outside the "period" of nine hours, during which service was to be permissible, was the basis of this legislation in the interest of the public safety. This legislation was not for the comfort of the employees. It was not based upon the ordinary demand for such legislation.

Its constitutionality as a regulation of interstate commerce may perhaps be solely dependent upon its purpose to make life safer on railroads by preventing exhaustion of employees controlling train movement, resulting from excessive or irregular periods of service. This was the menace at which the Congress aimed and which alone justified the regulation of hours of service under the commerce clause.

No construction which overlooks this fundamental purpose of the legislation is justifiable. No construction which permits an evasion of this great purpose of the act is permissible. This purpose is the key to the construction of the act.

Keeping in mind this purpose, the spreading out of the hours of employment into two or more periods is clearly unlawful and a violation not only of the spirit of the act but also of its letter.

The title of the act indicates that Congress intended to promote safety "by limiting the hours of service of employees."

As to telegraphers, this limitation was fixed by prohibiting service "for a longer *period* than nine hours."

Taking this last provision with the title the service is "limited" to a "period" of not more than nine hours. A period is "a definite portion of time marked and defined." Thus the act forbids the employment of a telegrapher outside the limit of a nine-hour period.

This nine-hour period may be assumed to begin when service begins in any twenty-four hour period. This construction gives to the word "period" its precise and accurate meaning as defined by standard lexicographers.

The construction contended for by the railroad gives no meaning to the word "period," and permits a splitting of the day and night into "tricks" which would give a telegrapher no consecutive hours of rest.

The construction given to the act by the Circuit Court of Appeals deprives the act of its vitality and defeats the purpose of Congress to make railroad travel safer, in this that it does not require the service to be limited to a period of nine hours, and therefore admits of a distribution of the nine hours into broken periods of service which could be distributed over the whole twenty-four-hour period without providing for the rest necessary for the pro-

tection of the traveling public. Its construction expressly permits splitting the nine hours of service into two periods of service covering a total period of twelve hours. If this is permissible, then the nine hours of service may be split into four periods spread out over the whole day and night.

Suppose an operator goes on duty at 6 o'clock in the morning, works till 7; goes on at 9 and works till 11; goes on again at 2 and works till 4; on again at 8 and works till 10; on again at 1 a. m. and works till 3. This is entirely possible under the construction of this statute for which plaintiff in error contends. It results in nine hours of service in a twenty-four hour period; it also results in the employee at no time having more than three consecutive hours of rest.

This is not permissible if the intent and purpose of Congress is fairly taken into consideration. The petitioner invokes those rules of statutory construction which apply to a remedial statute, a broad and liberal construction "most effectually to meet the beneficial end in view and to prevent a failure of the remedy."

Heyden's Case (3 Co. 7b).
Turtle v. *Hartwell* (6 T. R., 429).
Twycross v. *Grant* (2 C. P. D., 530).
U. S. v. *Freeman* (3 Howard, 565).
Dorousseau v. *U. S.* (6 Cranch, 314, 323).
Johnson v. *Southern Pac. Ry. Co.* (196 U. S., 1).
1 Kent Com., 462 and 468.

Potter's Dwarris on Statute and Constitutions, 208, 210, and 231.

Endlich on the Interpretation of Statute, 135, sec. 103.

It is always to be presumed that the legislature has intended the most reasonable and beneficial construction of their acts if the words of the act are not precise and clear, and such construction will be adopted as appears most reasonable and best suited to accomplish the objects of the Statute. (Potter's Dwarris on Statutes and Constitutions, p. 202, citing *Gore* v. *Brazier*, 3 Mass., 539, 540; Opinion of Justices, 22 Pick., 573, *Richards* v. *Daggett*, 4 Mass., 537; *Pearce* v. *Atwood*, 13 Mass., 343.)

It is respectfully submitted that unless it is apparent from the language used in this act that Congress intended to permit the splitting up of the period of service throughout the twenty-four-hour period, the decision of the Circuit Court of Appeals ought not to be allowed to stand.

The purpose of the act as may be gathered from its title, "To promote the safety of employees and travelers upon railroads," by a regulation of the hours of employees' service, most clearly and evidently was to provide such an opportunity for rest as will secure men with alert and unclouded minds and untired bodies for work in which so many perils lurk.

It is contended that the language "by limiting the hours of service" is not more pertinent to the language of the act itself than to have said: "By providing certain consecutive hours of rest."

That the construction of the act by the learned Circuit Court of Appeals is clearly erroneous, when the last proposition of law in the opinion is considered.

The court says: "A further answer is that dispatchers, being 'employees,' come under the protection of the main part of the section which gives to all employees 'at least eight consecutive hours off duty' in each day, counting from some point in the next day."

But it is apparent that the provision referred to for "at least eight consecutive hours off duty" relates only to one who has been "on duty sixteen hours in the aggregate in any twenty-four hour period." Thus by the construction given to the act by the Circuit Court of Appeals, to get the benefit of an eight-hour period of rest a telegrapher whose service is in express terms limited to nine hours must work an aggregate of sixteen hours in a twenty-four hour period.

This reduces the act to an absurdity and indicates that in its decision the court has overlooked not only the purpose and intent of Congress, but has failed to give due consideration to the specific terms and words of the act.

In other acts of Congress regulating hours of labor it is significant that different language is employed. In the "eight-hour law," "relating to the regulation of the hours of daily service of laborers, etc.," the service is "limited and restricted to eight hours in any one calendar day," and it is unlawful "to require or permit (employee) to work more than eight hours

in any calendar day." It is only in exceptional cases, and then where the spirit of the law has not been violated, that these hours have not been considered continuous. In the act we are considering the limitation is explicitly marked by the bounds of a "period."

The office at Corwith is a small office, but if evasion is here successful no interest of the public safety can be conserved by this law in any telegraph office in the land. Furthermore, the more remote an office, and the more insignificant the volume of its business, the more is it necessary that its single operator in some grave exigency of the railroad business be alert, vigilant, and clear-headed to act promptly in the interest of the safety of travelers.

PHILIP J. DOHERTY,
EDWARD A. MOSELEY,
Special Assistants to the Attorney-General.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

APPENDIX A.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, No. 1610.

OCTOBER TERM, A. D. 1909.
OCTOBER SESSION, A. D. 1909.

THE ATCHISON, TOPEKA AND Santa Fe Railway Company, plaintiff in error, *v.* UNITED STATES OF AMERICA, defendant in error.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

The writ of error is to reverse a judgment in favor of defendant in error, against the plaintiff in error, for the sum of $100, together with costs, entered upon a verdict, upon instruction of the court, in favor of appellee on the first, third, fifth, and seventh counts of the declaration.

The suit was brought under the Hours of Service act, approved March 4, 1907, United States Statutes at Large, volume 34, part 1, p. 1415.

The facts are stated in the opinion.

GROSSCUP, *Circuit Judge*, delivered the opinion:

Section 2 of the hours of service act, applicable to plaintiff in error, a common carrier within the meaning of that act, provides:

> SECTION 2. It shall be unlawful for any common carrier, its officers, etc., to require or permit any employee subject to this act to be, or remain, on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.
>
> *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to, or affecting, train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, etc.

The charge alleged was that plaintiff in error required and permitted Fred Hillhouse, one of its tele-

graph operators dispatching, reporting, transmitting, receiving, and delivering orders pertaining to and affecting train movements in interstate commerce at Corwith, in the State of Illinois, to be on duty in such office, continuously operated day and night, for a longer period than nine hours—the proof showing that he went on duty at 6.30 o'clock a. m., was given an intermission of three hours at 12 o'clock noon, resumed duty at 3 o'clock p. m., and went off duty at 6.30 p. m., making in all nine hours of actual service, but twelve hours from the beginning thereof to the end thereof.

A like charge was made respecting requirements upon one W. E. Sargent and one F. M. Elliott, covering the same hours of service but on different days.

Do these facts prove a violation of the act? The question is raised by appropriate exceptions to the instructions of the court, and by the refusal of the court to give instructions offered by the plaintiff in error.

The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into "two periods," separated by the intermission (for which the statute makes no provision), or is to be considered as "one period," including the intermission, which would make it a period of twelve hours. But manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be com-

puted as a part of the employee's service; for the statute was enacted in view of the customs of the land, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is, therefore, reduced to its contention respecting the word "period"—that "period" is "a term," "a cycle," something "continuous" between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

We can not concur in this view. The statute was passed with custom as a background. According to custom, nine hours' work unquestionably means nine hours actual employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new Western States, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly, Congress did not intend to override these existing customs; making it necessary either that the railroad company should not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a different telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart),

irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word "period," all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and in the light of ordinary custom, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short periods at short intervals, say every alternate hour, or an hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that dispatchers, being "employees," come under the protection of the main part of the section which gives to all employees "at least eight consecutive hours off duty" in each day, counting from some point in the next day.

The judgment of the district court is reversed and the cause remanded, with instructions to grant a new trial.

APPENDIX B.

UNITED STATES
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

In the District Court of the United States for the Northern District of Illinois.

Decided April 21, 1909.

OPINION OF THE COURT DENYING DEFENDANT'S MOTION FOR AN ORDER DIRECTING THE JURY TO RETURN A VERDICT OF NOT GUILTY.

LANDIS, *District Judge:*

In this proceeding the defendant is charged with a violation of the statute which was enacted to limit the hours of labor of railway employees having to do with the movement of trains. The evidence having all been heard, the defendant moves for an order directing a verdict of not guilty. The controversy relates to that provision of the law respecting telegraph operators employed at offices operated continuously day and night. The statute is as follows:

(Section 1 enacts that the provisions of the law shall apply to railway common carriers, interstate,

and provides that "the term 'employees' * * * shall be held to mean persons actually engaged in or connected with the movement of any train.")

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four

> additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further,* The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

The remaining sections provide for the enforcement of the law, the imposition of penalties, and specify exceptions to its operation (which are not material here).

For the United States the claim is that this law forbids the operator's employment for more than nine hours in any twenty-four hour period, and requires the employment to be continuous.

For the defendant it is contended that the law authorizes the employment of operators nine hours in the *aggregate* in any twenty-four hour period; that the office here is not one "operated continuously night and day;" and further, that the employees involved "are not persons actually engaged in or connected with the movement of any train" within the meaning of the law. The facts are as follows: The defendant is a railway common carrier from Chicago to points in States west of the Mississippi River and has a railroad yard called Corwith, located some distance from the main line in the western part of Chicago; at this yard is a telegraph office where two operators are employed. The day man works from 6.30 o'clock in the morning until 6.30

o'clock in the evening, with three hours off duty from 12 o'clock noon until 3 o'clock in the afternoon. The night man works from 6.30 o'clock at night until 6.30 the next morning, with three hours off duty from 12 o'clock midnight until 3 o'clock a. m. The bulk of the work done by these two men pertains to general railroad business other than the movement of trains. However, during each day and night, one or two freight trains, destined interstate, pull out of Corwith and move west over the rails of the main line. This train movement is in compliance with clearance orders telegraphed in each instance by defendant's division dispatcher to Corwith and by the operators there taken from the wire and delivered to the train crews.

The court is of the opinion that this office is clearly one "continuously operated night and day" within the meaning of the statute. The manifest purpose was to apply the provisions of the law to all employees having to do with train movement, and knowing that some railway telegraph offices were open only during the daytime, while others were open night and day, Congress inserted as a regulation for the latter class the provision respecting those "continuously operated night and day." It can hardly be that Congress had it in mind by the use of the word "continuously" to place it in the power of a railway company to except a night and day office from the operation of the law by the simple process of closing the office and sending the operator away for a few minutes, or, as in this case, for three hours.

Nor does the mere fact that employees are concerned but a trifle with the movement of trains, or are concerned with the movement of but a few trains, except them from the operation of the statute. The language of the law is: "The term 'employees' * * * shall be held to mean persons actually engaged in or connected with the movement of *any* train."

The remaining question is not so free from difficulty. While the purpose of Congress "to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon" clearly appears from the title of the act, it must be admitted the provision relating to persons engaged in the telegraph service might have been more happily phrased to accomplish that purpose. However, as will be observed from an examination of the whole of sections 1 and 2, it was the object of Congress to place a limit on the time of service of all railway employees having to do with the movement of trains interstate. It also clearly appears from section 2 that it was definitely and distinctly in the legislative mind that there were two classes of such employees, namely, those whose work was *continuous* and those whose work was *intermittent*. Accordingly, for the former class, it was provided that the limit should be "sixteen consecutive hours," to be succeeded by ten consecutive hours off duty, and for the latter class the limit is placed on the *aggregate* of service, the language being: "No such employee who has been on duty sixteen hours in the

aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty." Then follows the special proviso for persons engaged in the telegraph service: "That no operator, train dispatcher, or other employee who by the use of the telegraph * * * transmits or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all * * * stations continuously operated night and day, nor for a longer period than thirteen hours * * * in all stations operated only during the daytime, except in cases of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

The defendant urges that this language should be read as if it were as follows: "That no operator * * * shall be required or permitted to be or remain on duty for more than nine hours in the aggregate in any twenty-four-hour period."

But the use of the word "period" in the nine-hour provision of the act excludes this construction. "Period" is the antithesis of "aggregate." It implies continuity, unbrokenness, uninterruptedness, as distinguished from "aggregate," which signifies the sum or total or gross amount of separate and distinct particles. Thus reference is made to the "Revolu-

tionary period," the "Reconstruction period," the "twenty-four-hour period" (as used in the act itself), each of which expressions has a definite and well-understood meaning which is diametrically opposed to and which excludes the idea that is the basis of the defendant's claim. Moreover, immediately preceding the provision under consideration is the language used by Congress in dealing with the same subject as related to railway employees in general, which, as before observed, distinctly provides a limitation on the hours of service in the *aggregate* as distinguished from continuous or unbroken service. And in the subsequent provision relating to day offices, where the service is prohibited for a longer period than thirteen hours except in cases of emergency, when four additional hours' service in a twenty-four-hour period is allowed, and in the concluding proviso authorizing the Interstate Commerce Commission, for good cause, to extend the period in which the carrier shall comply with the act, the word is used in a sense contrary to the meaning which the defendant argues should be given to it in the nine-hour clause. Can it be that Congress intended the court to give the word as used here a meaning opposed not only to its true import, but opposed as well to the sense in which the word is used elsewhere in the same section?

Being of the opinion that a twenty-four-hour period is twenty-four consecutive hours, and that a nine-hour period is nine consecutive hours, my conclusion is that the nine-hour period during which the law

authorized the day man to be at work expired at 3.30 p. m.; and that inasmuch as he was required or permitted to be "on duty" three hours thereafter, the law has been violated. And so with respect to the night man.

The defendant's motion for an order requiring the United States to elect one count and proceed thereon is without merit. The language of the statute is plain and provides that the carrier shall be liable "for each and every violation." This, I take it, means each and every twenty-four-hour period in which the prohibition of the law is ignored.

Let there be an order overruling both motions of the defendant.

HOURS OF SERVICE ACT.

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United

States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall he held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations

continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to

have had knowledge of all acts of all its officers and agents: *Provided,* That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further,* That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Public No. 274, approved March 4, 1907, 11.50 a. m.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PETITIONER,
v.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.
No. 878.

MOTION TO ADVANCE.

An action was brought against the respondent on February 2, 1909, in the District Court of the United States for the District of Illinois to recover certain penalties for violations of the act of Congress approved March 4, 1907 (34 Stat., 1415), "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," commonly called the "Hours-of-service act."

The petition contained seven counts alleging as many different offenses under the proviso of section 2 of the act. The section is as follows:

> That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a

longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

The petition alleged that the defendant, a common carrier within the provisions of the act referred to, required and permitted one of its telegraph operators who dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting train movements in interstate commerce at Corwith, Ill., to be on duty at that office, operated continuously night and day, for a longer period than nine hours. It further alleged that there was no case of emergency at the time, nor any case of casualty or unavoidable accident or act of God.

From the evidence, as to which there seems to be no dispute, it appears that the operator went on duty at 6.30 a. m., was allowed an intermission of three hours—from 12 o'clock noon to 3 p. m.—then resumed duty, and went off duty at 6.30 p. m.

Defendant pleaded not guilty and the case was tried by a jury. At the close of the evidence counts 2, 4, and 6 of the petition were dismissed on motion of counsel for the Government; but the jury returned a verdict of guilty as to the four other counts. Motions for new trial and in arrest of judgment were overruled and judgment was entered.

A writ of error was sued out from the Circuit Court of Appeals for the Seventh Circuit, which reversed the judgment and remanded the case, with instructions to grant a new trial.

On April 18, 1910, the Government submitted a petition for certiorari to this court, which was granted on April 25.

Does the proviso of section 2 fix a "period" of nine hours in any twenty-four-hour period beyond or outside the limits of which period no service of telegraphers is permissible; or is the term "for a longer period than nine hours" to be construed to mean nine hours in the aggregate in any twenty-four-hour period?

The question involved is a most important one; the safety of the railroad employees and the traveling public is at stake; and the rights and interests of the railroad companies and their telegraphers throughout the whole country are involved. There is, therefore, necessity for a prompt construction of the act by this court; and the Solicitor-General accordingly moves the court to advance the case on the docket for hearing on a day convenient to the court during the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1910.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES, PETITIONER,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY CO., respondent.
} No. 504.

BRIEF AND ARGUMENT FOR PETITIONER.

Two questions are squarely presented in this case and a third is suggested by the argument of respondent. These questions are: First. Was the Corwith office one "continuously operated night and day?" Second. Was the practice of defendant in splitting the hours of service a violation of the law? And the third question, which is merely suggested and not argued to any extent, is that the act infringes upon liberty of contract.

It will not be without benefit at the inception of the argument to consider the purpose of the statute.

President Roosevelt, in his message to the third session of the Fifty-eighth Congress, said:

> I * * * would also point out to Congress the urgent need of legislation in the interest of the public safety, limiting the hours

of labor for railroad employees in train service upon railroads engaged in interstate commerce.

In a later message he said:

> The excessive hours of labor to which railroad employees in train service are in many cases subjected is also a matter which may well engage the serious attention of Congress. The strain, both mental and physical, upon those who are engaged in the movement and operation of railroad trains under a modern condition is perhaps greater than that which exists in any other industry, and if there are any reasons for limiting by law the hours of labor in any employment they certainly apply with peculiar force to the employment of those upon whose vigilance, alertness in the performance of their duty, the safety of all who travel by rail depends.

The Interstate Commerce Commission in its eighteenth annual report called attention to the general situation, saying:

> The part played by excessive hours of labor in causing railroad accidents is a question that calls for serious consideration. The bulletins published by the Commission record many accidents where the employees involved have been on duty an excessive number of hours, and many complaints from employees that have been required to work for excessive periods of time have been brought to the attention of the Commission. There are a few roads that have stringent rules to guard against the overworking of trainmen, but in most cases the matter is left entirely to the

> discretion of the men and to subordinate officials immediately in charge. The subordinate officials, in their eagerness to keep traffic moving, frequently overtax the men, and in many cases the men themselves, through greed for making big pay, willingly remain on duty for excessive periods of time. If there is a reason for remedying the hours of labor in any employment it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent on the alertness and intelligence of train employees.

In its nineteenth annual report the Commission also said:

> Another important feature of railroad operation is the hours of labor of railroad employees, especially of enginemen, conductors, and other trainmen, telegraph operators, and signalmen. All these men are constantly charged with delicate and responsible duties, and they should never be on duty except when in good physical and mental condition. The need of a high standard in this respect and of care on the part of the supervisory officers to see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules limiting the hours of work and providing suitable rest periods; but these rules often appear to be very poorly enforced. Evidence of overwork appears frequently in the accident reports. Besides those cases of men remaining on duty because of

wrecks or snowstorms or other emergencies, there is much irregularity in everyday service. The disposition of men to work beyond reasonable limits of physical endurance for the sake of facilitating the business of the railroad or to increase their earnings may be seen in other departments than the train service. Signalmen, who usually work regular turns of 12 hours each, sometimes take each other's places in case of sickness or an unexpected call of a man away from his home, and thus remain on duty 36 hours at a time.

This defect in the service due to overwork is frequently discovered in conjunction with a deficiency of another sort—inexperience.

Men who have been but a few months in the service, and who have yet much to learn concerning some features of their duties, should be required to comply with the rest-time regulation with the most scrupulous care; yet it often happens, as has been shown in the accident records, that new men, admittedly less competent for their duties on that account, are the very ones who have been put to the additional test of working hours.

The serious accidents on railroads causing great loss of life seemed to be in a great number of cases due to tired, worn-out employees, and this fact challenged the attention of Congress along the line of some legislation making essential proper rest on the part of employees.

This power of regulation on the part of Congress, intended to safeguard human life, should not be mini-

mized. Property *ought* not to be imperiled, but human life *must* not be sacrificed.

After the repeated recommendations of the Interstate Commerce Commission before referred to, and the messages of the President, Congress passed the act in question. This act aims at incapacity and seeks to prevent the spreading of the labor of the employees over a whole 24-hour period. In stating the purpose of a similar act the Montana Supreme Court, in *State* v. *N. P. Ry. Co.* (93 Pac., 945), said:

> The purpose of the legislature in the enactment of this statute was to secure better service at the hands of all persons operating lines of railroad within or through this State and at the same time to promote the safety of the lives and property intrusted to them. It is apparent to everyone that a continuance beyond a reasonable time each day in the performance of the exacting duties incident to an employment that is always attended with danger tends to impair both the health and efficiency of employees, and should not be permitted except in cases of necessity.

The object of the act is to make the interstate highways of the country safer for travelers and employees. Its fundamental purpose is the preservation of human life. The questions raised and which will be hereafter discussed, outside of the constitutional question suggested, are questions merely of statutory construction.

FIRST.

Respondent's station and telegraph office at Corwith was "continuously operated night and day" within the meaning of the statute.

An office is "continuously operated night and day" within the meaning of the statute if it is kept open and in operation for such part of the day and such part of the night as may be necessary to do the day and night work, respectively.

This proposition may be sustained in several different ways:

1. Whether exact or only approximate continuity is contemplated by the use of the word "continuously" depends altogether upon the connection in which it is used. Thus we speak of continuous operations, negotiations, debates, performances, fighting, etc., lasting for stated periods, without meaning that they were never interrupted for food, rest, or recreation. If we say "it has rained continuously for a week or a month" or "it has rained continuously night and day for a week or a month" no one would suppose that we meant that the rain had not ceased falling for an instant during the time mentioned. So, too, courts have said that an injury is "continuous" if it recurs at repeated intervals (*Wood* v. *Sutcliffe*, 8 Eng. L. & Eq., 217, 220); and that a *ride* is continuous if it is not interrupted for any considerable length of time (*Garrison* v. *United Railways Co.*, 91 Md., 347).

To determine the meaning of the term "continuously operated night and day," therefore, we must look for the comparison which Congress was making;

and when we do that we find that the distinction was between offices "operated *only during the daytime*" on the one hand and those operated "night and day" on the other hand. No distinction was attempted or intended between offices operated without interruption all day and all night, and such as were operated practically all day and all night, but not without interruption for one or another reason.

In view of this fact, therefore, it is plain that, even if the word "continuously" qualifies the phrase "operated night and day," still the result is only to require that the operations be substantially continuous; and this interpretation gains additional force when it is remembered not only that a strict construction of the word "continuously" would enable railroads to evade the law by closing their offices for a few minutes each day, but also that most offices are in fact usually closed for short periods, if only while the operators get their meals. Can it be that an office which is closed only, say, half an hour each day, while the operator gets his lunch or dinner, is not continuously operated within the meaning of the statute?

2. In view of the fact that the statutory differentiation is between day offices on the one hand and day and night offices on the other hand; and in view, further, of the practical considerations which will be adverted to in subdivision 3 following, it is plain that the word "continuously" does not qualify the phrase "operated night and day," but that instead the phrase "night and day" qualifies or explains the

meaning of the words "continuously operated," being introduced for the purpose of showing that by the expression "continuously operated" Congress did not mean operated continuously and uninterruptedly but meant "operated night and day." This would be very clear if a comma were inserted so as to make the phrase read "continuously operated, night and day;" for it would then be apparent that the statutory comparison was between offices "operated *only during the daytime*" on the one hand, and offices "continuously operated" on the other hand, and that the words "night and day" explained the meaning of the words "continuously operated." The clause should therefore be construed precisely as it would be if it read "continuously operated, i. e., operated night and day."

3. It can not be doubted that Congress intended by the proviso to legislate concerning *all* offices, towers, etc. To suppose otherwise is impossible, for this reason: The fixing of a limitation of the hours of work of operators shorter than that adopted in the case of other employees is explicable only on the theory that this work (depending as it does on an exact and accurate following or making of but slightly different sounds on a delicate instrument) is so difficult and mistakes in it so apt to cause disasters that the men engaged in it should always be in the highest state of efficiency. The limitation of 9 hours in the case of operators at offices continuously operated day and night, while operators at day offices are allowed to work 13 hours, likewise is explicable only

on the theory that Congress considered the work at night and day offices more exacting and difficult than that at day offices; and the reasons for this are obvious. In the first place, the offices kept open night and day are the busier offices, at which the employees are obliged to work under higher pressure. In the second place, persons who have to work at night, and therefore have to get their rest during the day, may be reasonably expected not to get such complete rest as those who are able to rest during the night. It is, therefore, indisputable that Congress fixed the hours of service with reference to the arduousness of the work; and such being the case, it is impossible to conceive that Congress intended to permit any operator to work for a longer period than that prescribed for the operator whose work is easiest, viz, the operator at the day office. If, however, Congress did *not* intend to legislate for all operators in the proviso, then it would be clear that it must have intended to allow operators at the offices not embraced in the proviso to work *longer* than 13 hours. As a result it would have been guilty of the absurdity of declaring that while nine hours should constitute a day's work for the operator whose work is hardest, and while 13 hours should constitute a day's work for the operator whose work is easiest, yet the operator whose work, while it may be easier than the hardest, is harder than the easiest (viz, the one who works in an office operated partly by day and partly by night) may, nevertheless, be worked for at least *16* hours. Such a proposition is unworthy of consideration.

Since, therefore, Congress must have intended to embrace all offices in the proviso, it follows that in the opinion of Congress every office must fall within one or the other of the two specified kinds; and as an office operated part of the day and part of the night, or rather most of the day and most of the night, can not possibly be viewed as an office "operated only during the daytime," it must be that Congress intended the phrase "continuously operated night and day" to be construed as though it read "continuously operated; i. e., operated night and day."

4. Finally, since it is obvious that in using the language in question Congress was merely classifying offices into two general classes and was not attempting exact definitions of either class, too much significance should not be given to a single word, but the general purpose of Congress should be carried out by construction. This is especially true because of the fact that the statute is a remedial one, and therefore, despite its penal aspects, should receive a liberal construction, as will be shown later.

II.

The word "continuously" may be read in the sense of "regularly" or "habitually" or "customarily." It has been so construed (*Hodge* v. *U. S. Steel Corporations*, 64 N. J. Eq., 807), and there is good reason why it should be so construed here. As has been pointed out already, practical considerations show that Congress could not have intended to distinguish between offices which were operated with absolute continuity and such as were operated with practical

continuity day and night; and there is no reason why such intention should not be given effect by construing the word "continuously" as meaning "regularly" or "habitually." Such may well have been the congressional view, for it does, undoubtedly, sometimes happen that an office which is generally operated in the daytime only will temporarily, because of some unexpected and unforeseen contingency, be operated both night and day.

III.

But even if both of the two preceding views be unsound and if the statute only applies in case the operations continue uninterruptedly both day and night, the statute certainly does not require that they be continued uninterruptedly *all* day and *all* night. There is continuous operation day and night if operations begin in the daytime and proceed without interruption into the night. At most, all that is necessary to bring a given case within the statute is that the operation be not interrupted or suspended because night falls. There is nothing in the statute which says that the operations must continue *all* day and *all* night. And here the operations were in fact continuous from day to night and from night to day; i. e., from 3 o'clock each afternoon to midnight, and from 3 o'clock each morning until noon.

Respondent recognized the office as a "day and night" office by so designating it on the time card (Rec., p. —); and it may be assumed that the term so used on its time card had a well-known meaning to railroad men.

What is the meaning of the expression "on duty for a longer period than 9 hours in any 24-hour period?"

It is contended by the defendant railroad company that the 9 hours of the period need not be consecutive; that the only inhibition of the statute is that the operators, train dispatchers, or employees shall not work over 9 hours in the 24. The facts in the present case indicate that an operator went on duty at 6.30 in the morning and so remained until 12.30 at noon, with an intermission to 3.30, and labored then until 6.30.

The determination of the legal propositions can not rest upon the facts of the particular case. It may be that many operators would prefer such an arrangement as defendants have. It may be that in a particular instance it would not work harm. But particular instances can not determine the law. If defendant's theory is correct, a telegraph operator could go on duty at 6.30 in the morning, work 2 hours, be off duty 2 hours, engage again in service from 10.30 to 12.30, be then off duty to 2.30, again on duty from 2.30 to 4.30, off until 6.30, on from 6.30 to 8.30, off from 8.30 to 10.30, and work from 10.30 to 11.30, and the same not constitute a violation of the act.

The purpose of the act, while entitled "To promote the safety of employees and travelers on railroads by limiting the hours of service of the employees thereof," is a statute to secure rest for the employee in order that he may be able better to do his work

with more safety to the public. It is apparent that such rest should be a continuous rest, not intermittent, as would be possible under the construction contended by defendants.

The Government contends that the term "on duty for a longer period than 9 hours in any 24-hour period" is plain, and that the word period must be given some significance; that the period commences when the operator goes to work and continues 9 hours therefrom. It is true in section 2 of the act, with reference to the time that an employee may remain on duty, that the term is used "for a longer period than 16 consecutive hours." It is also true that with reference to an employee who has been on duty 16 hours the term is used "16 hours in the aggregate." Defendants would read into the statute the words "in the aggregate" so that the section would read: "On duty for a longer period than 9 hours in the aggregate in any 24-hour period." The word "period" can not be construed as an unmeaning and useless word in this statute. It is not contended that the employee must remain at work for 9 hours, but it is contended that the period, regardless of the question of work, is a space of time of 9 hours. Why is the term "24-hour period" used in the statute? Does this not mean a portion of time commencing at a certain hour and extending through for 24 hours? Could it be contended that a 24-hour period meant 12 hours, then an intermission of 6 hours, and then 12 hours more?

Defendants in their argument recognize and continually use the term "24-hour period." Why dis-

tinguish between the meaning of "period" in 24-hour period, and in 9-hour period? If defendant's theory is correct as to the 9-hour period, applying the same to a 24-hour period would absolutely destroy and nullify the entire act. Further, it is apparent that had Congress intended that the 9 hours was to be 9 hours in the aggregate, it would have so stated, as it did with reference to the 16 hours in the aggregate. The word "period" carries with it the idea of a cycle, a term. A man works for a period of time. That may not mean that he works every hour of the time; that he can not stop for lunch or sleep; but whether he stops or whether he works, the period goes on. As for instance a man employed for one year from January 1, 1910. The period is the year. The time that he does not actually work, such as eating times and sleeping times, still remain a part of the period. The Supreme Court of the United States in *Sampson* v. *Peaslee* (20 How., 571), referring to "period," said:

> The word "period" has its etymological meaning, but it also has a distinctive signification, according to the subject with which it may be used in connection. It may mean any portion of complete time, from a thousand years or less to the period of a day; and when used to designate an act to be done or begun, though its completion may take an uncertain time, as, for instance, the act of exportation, it must mean the day on which the exportation commences, or it would be an unmeaning and useless word in its connection with the statute.

In Twenty-second American and English Encyclopedia of Law, page 678, "period" is defined as a "stated and recurring interval of time; a round or series of years by which time is measured."

Webster defines "period" as follows: "A portion of time as limited and determined by some recurring phenomenon, as by the completion of a revolution of one of the heavenly bodies; a series of divisions of time in which something is completed and ready to recommence and go on in the same order. Hence, specifically, a stated and recurring interval of time; a round or revolving series of years by which time is measured."

The definition in the Standard Dictionary is as follows: "A lapse of time or series of years; a cycle, an age, an area; the concluding limit of a round of years or events; termination; end."

Crabb's English Synonymes, page 799: "Time included within any given points is termed a period; thus the period of day, or of night, is the space of time comprehended between the rising and setting, or the setting and rising, of the sun."

The Court of Appeals of New York in *People* v. *Lesk* (67 N. Y., 521–528) says:

> A period of time is a stated and recurring interval of time; a round or series of years by which time is measured.

State v. *Strauss* (49 Md., 288):

> Period, when employed in the law, is to be interpreted in its ordinary and accepted import.

In re Becker (80 N. Y. Supp., 1115):

> The general definition of the word "period" in reference to time, is to refer to a continuous period.

The construction contended for by respondent would require the court to read into the act the words "in the aggregate." To permit a construction to the act such as given by the Circuit Court of Appeals and such as is contended by respondent is correct, would absolutely destroy the purpose of the act. In the construction of a statute there should be reference to its object and it should not be so construed as to destroy its object, if another construction that will save the statute is possible.

Sutherland on Statutory Construction (2d ed., secs. 369–370):

> A statute is to be construed with reference to its manifest object, and if the language is susceptible to two constructions, one of which will carry out and the other defeat the manifest object, it should receive the *former* construction.

It is evident that Congress had this matter in mind from the use of the language employed; that while making unnecessary the employment of as many operators, it would prevent those employed from enjoying the consecutive hours.

The railroad's practice of splitting tricks breaks into the consecutive hours of rest which it was the intention of Congress that operators should have.

It is contended by respondent that the act is a penal one and hence should be strictly construed. Granting for the sake of argument that it is a penal statute, it does not follow that the forced and technical construction contended by respondent should be given. As stated by Mr. Justice Harlan in *Northern Securities Company* v. *United States* (193 U. S., 357):

> We must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction exclude cases from it which are obviously within its provisions, What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

In *United States* v. *Wiltberger* (5 Wheat., 76), Chief Justice Marshall said:

> That though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. * * * The intention of the legislature is to be collected from the words they employ.

Chief Justice Taney, in *United States* v. *Morris* (14 Pet., 464), said:

> The evident intention of the legislature ought not to be defeated by a forced or overstrict construction.

In *People* v. *Bartow* (6 Cowan, 290) it was said:

> Although a penal statute is to be construed strictly the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction.

The mischief sought to be remedied is the splitting of tricks and the long hours of service. The remedy is continuous hours of rest. Hence, a period of 9 hours of duty and no more in any 24-hour period.

Lord Coke said in *Heyden's case* (3 Co., 7):

> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restricting or enlarging the common law) four things are to be discussed and considered:
>
> 1. What was the common law before the making of the act?
>
> 2. What was the mischief and defect for which the common law did not provide?
>
> 3. What remedy hath Parliament resolved and appointed to cure the disease of the commonwealth?
>
> 4. The true reason of the remedy.
>
> And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and suppress subtle inventions and evasions for the continuance of the mischief.

Endlich on the "Interpretation of Statutes," page 135, section 103:

> *Beneficial construction.*—It is said to be the duty of the judge to make such construction

> of a statute as shall suppress the mischief and advance the remedy (*Heyden's case*, 3 Rep., 7b; per Lord Kenyon in *Tuttle* v. *Hartwell*, 6 T. R., 429; per Cockburn, C. J., in *Twycross* v. *Grant*, 2 C. P. D., 530), and the widest operation is therefore to be given to the enactment so long as it does not go beyond its real object and scope. When, for instance, the language, in its usual meaning, falls short of the whole object of the legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases. (Per Cleasby, B., in *Scott* v. *Legg*, 2 Ex. D., 42.)

Potter's Dwarris on "Statutory Construction," page 194, note:

> It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and every part of a statute, taken and compared together. When the words of the statute are not explicit, the intention is to be collected from the context—from the occasion and necessity of the law—from the mischief felt, and the object and remedy in view; and the intention is to be taken or presumed, according to what is consonant with reason and good discretion. This was the rule laid down by Plowden, pages 10, 57, 205, 363, and by which Chancellor Kent says: "The sages of the laws have ever been guided in seeking for the inten-

tion of the legislature;" and which he approves, "as maxims of sound interpretations, which have been accumulated by experience, and ratified by the approbation of ages." (1 Kent Com., 462.)

Same, page 201, note:

> Whenever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded—from the end in view—or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded; and not only within a *like* reason. (*U. S.* v. *Freeman*, 3 How. (U. S.), 565.)

III.

The act is remedial and therefore, despite its penal provisions, it is to be reasonably construed so as to accomplish the purpose of its enactment.

The rule is well settled that when statutes are primarily remedial and the penal provisions are merely incidental to its enforcement, the statute is to be construed, if not liberally, at least so as to accomplish the congressional purpose.

Speaking of the application of this rule to the Safety Appliance Act (which is identical in its purpose to the Hours of Service Act), this court said:

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. (*Johnson* v. *So. Pac. R. R.*, 196 U. S., 1, 17.)

Again, in holding that a "shovel car"—a work car—was a car "engaged in interstate commerce" within the meaning of the Safety Appliance Act as it originally stood, this court said, after reviewing the Johnson case:

> These considerations apply to shovel cars as well as to locomotives, and show that the words "used in moving interstate traffic" should not be taken in a narrow sense. (*Schlemmer* v. *B. R. & C. Ry. Co.*, 205 U. S., 1, 10.)

The rule of construction applicable to remedial statutes was stated by this court in the following language:

> The statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. (*N. Y., N. H. & H. R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391.)

IV.

History and phraseology of the proviso with reference to telegraph operators.

Respondent in its brief on page 39 discusses the history of the proviso with reference to telegraphers and refers to the fact that in the committee report of the House of Representatives, made by Mr. Esch, he reported in lieu of Senate bill 5133 a bill almost identical in language as that afterwards passed by Congress, except that in the proviso the word "consecutive" was used between the words "nine" and "hours," and that in the law as finally passed the word "consecutive" was stricken from the bill. It is therefore quite important to notice more in detail the history of the resolution.

The bill (S. 5133, 59th Cong.) as it originally passed the Senate contained no special provision with reference to telegraph operators. (41 Cong. Rec., pt. 1, p. 893.)

The proviso with reference to telegraph operators was inserted in the substitute bill proposed by the House Committee on Interstate and Foreign Commerce. (H. R. Rept. No. 7641, 59th Cong., 2d sess., p. 1; 41 Cong. Rec., pt. 4, p. 3235.) As so proposed the proviso read:

> *Provided*, That no telegraph operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine *consecutive* hours in any twenty-four-hour period in

> all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen consecutive hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three consecutive days in any week.

After much debate on the bill, during the course of which many amendments were offered, the House Committee on Rules submitted a report recommending the passage of a resolution providing that the substitute bill recommended by the Committee on Interstate and Foreign Commerce be taken up for consideration and be agreed to by the House with certain suggested amendments, among which was one numbered six, striking out the word "consecutive" in the proviso so as to make it read as follows:

> That no operator, train dispatcher, or other employee who, by the use of the telephone or telegraph dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to remain on duty for a longer period than nine hours in any twenty-four-hour period * * *.

In explanation of this proposed amendment Mr. Dalzell, chairman of the committee, who submitted the report, stated that—

> It is perfectly apparent that the object sought to be accomplished by that paragraph

> was that no employee should be engaged for more than nine hours in a twenty-four-hour period. It is also perfectly apparent that if you leave the word "consecutive" in he may be employed for nine consecutive hours, unemployed for an hour or half an hour, and then employed for nine hours more in the same twenty-four hours. It will therefore be apparent that to strike out the word is in the interest of the legislation that is sought to be enacted. (41 Cong. Rec., pt. 4, p. 3756.)

The resolution submitted by the committee on rules was adopted (id., p. 3761) and thereby the bill with the amendment striking out the word "consecutive" was passed by the House.

The Senate refused to concur in the House amendment and a conference committee was appointed. It recommeded that the proviso as adopted by the House be amended so as to read as follows:

> *Provided*, That no train dispatcher, or dispatcher's operator in the dispatcher's office, or other employee who, by the use of the telegraph or telephone issues orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than eight hours in any twenty-four-hour period, and that no employee who, by the use of the telegraph or telephone transmits, receives, or delivers orders pertaining to or affecting train movements (excepting those who issue train orders), or who is charged with the operation of signals or switches from towers, offices, or stations, shall be required or per-

> mitted to be or remain on duty for a longer period than twelve hours in the aggregate in any twenty-four-hour period. (41 Cong. Rec., pt. 5, p. 4342.)

This conference report was rejected by the Senate. (Id., p. 4549.) Another conference committee was appointed; and upon its appointment the House adopted a resolution directing its conferees to insist on the retention of the proviso in the following form:

> *Provided*, That no operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the the daytime, except in case of emergency, etc. (41 Cong. Rec., pt. 5, p. 4597.)

Pursuant to this resolution the House conferees insisted on the phraseology quoted and succeeded in forcing the Senate conferees to agree to it. (41 Cong. Rec., pt. 5, p. 4621.)

Whereupon the conference report was adopted by both Houses and the proviso thereby became a law. (Id., 4636 and 4637.)

It is of vital importance to note that throughout the debates the objection to the House proviso was

that it would require *three* operators instead of two at day and night offices and that there were not enough operators in the country to supply the demand for more operators which would thereby be created (41 Cong. Rec., pt. 5, p. 4597 et seq.), and this objection was only overcome by the House conferees finally consenting *to the addition to a further proviso allowing the Interstate Commerce Commission, for good cause shown, to extend the time within which any particular railroad should comply with the law* (41 Cong. Rec., pt. 5, p. 4621).

It is worthy of especial note that one of counsel for respondent in the present case, Mr. Gardiner Lathrop, objected to the House provision on the stated grounds, by means of a telegram to each Senator, the same appearing in Congressional Record 41, part 5, page 4599. The telegram as it appears in said Congressional Record is as follows:

> House amendment to sixteen-hour bill restricting telegraph operators who transmit or receive messages affecting train movements to nine hours' service would impose great hardship on railroad companies, requiring three men at local stations instead of two. The work is not hard and the supply of operators is insufficient to furnish three for each telegraph station. Labor unions undoubtedly secured insertion of amendment in order to create demand for operators, with view to higher wages. Train dispatchers, who direct movement of trains, work only eight hours, and if amendment is to be adhered to it should be limited to dispatchers.

It is therefore apparent, if the Congressional Record is correct, that one who is now counsel in this case took the position and called the attention of Congress to the position that the passage of this act would require three men at local stations instead of two. The argument of counsel now is that by splitting the trick two men can be used instead of three and that such was the purpose and intention of Congress. It would appear that the attention of Congress was called to the fact that the act would require three men instead of two, and that with that notice before them Congress deliberately passed the act. It would seem that having so contended counsel was not now in position to claim that the act means the contrary of what was then claimed.

The reason assigned by the Committee on Rules for striking out the word "consecutive" before the words "nine hours," coupled with the refusal of the House to consent to the provision allowing operators to be worked 12 hours in the aggregate, and the debates and proviso to the proviso, tend to show that Congress intended that each operator to be employed but for one period daily and that such period should not exceed 9 hours in length.

As a matter of information it should be said that some mistake was made in the verbiage of the proviso as recommended in the last conference report, which was corrected by the adoption of a joint resolution giving the exact language of the statute in the form in which it now stands. (41 Cong. Rec., pt. 5, p. 4637; id., 4663.)

It is thus apparent that the word "consecutive" before the word "hours" in the original proviso, which read "for a longer period than 9 consecutive hours," was stricken out, as explained by the committee report, to preclude any idea that an operator could be worked for any longer time than 9 hours.

Further, the House consistently refused to concur in the Senate amendment allowing operators to work more than 12 hours in the aggregate. Thus we have a declaration on the one hand that the operator could be worked but for one period, and on the other that such period must be a continuous one of not exceeding 9 hours.

V.

Does the law unwarrantably interfere with the right of contract guaranteed by the Constitution?

This question has been discussed in the brief for the Interstate Commerce Commission in No. 222, *Baltimore & Ohio R. Co., appellant,* v. *Interstate Commerce Commission, appellee,* page 23; and as these cases are somewhat in their nature companions, it is probably unnecessary to enter into an extended discussion of the question in this case. The principles as laid down in *Holden* v. *Hardy* (169 U. S., 366) would seem to be applicable. The law there under consideration, it is true, was a State statute, while here it is a Federal enactment; but this can make no difference, as the fourteenth amendment, containing the equal-protection clause besides the due process law, is certainly no less broad than

the fifth amendment restricting the powers of Congress with respect to the denial of due process. The correctness of the decision in *Holden* v. *Hardy* has many times been recognized by this court. (See *Muller* v. *Oregon*, 208 U. S., 412.) There is no such thing as absolute freedom of contract. (*Atlantic Coast Line R. R. Co.* v. *Riverside Mills;* decided by the court January 3, 1911.)

The hours of service law is a fair, reasonable, and appropriate exercise of the powers of Congress. It is not an unreasonable or arbitrary exercise of such power and in no way infringes upon the freedom of contract guaranteed by the Constitution.

For convenience of reference a copy of the act is attached hereto.

GEO. W. WICKERSHAM,
Attorney General.
WM. S. KENYON,
Assistant to the Attorney General.
PHILIP J. DOHERTY,
Special Assistant United States Attorney.

APPENDIX.

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

Common carrier and employees subject to Act.

Meaning of term "railroad."

Meaning of term "employees."

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been

Sixteen hours the maximum continuous service of trainmen.

Ten consecutive hours off duty.

on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Service hours of telegraph and telephone operators.

Commission may extend period.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and

Penalty for violation.

Prosecutions.

Unavoidable accidents, etc.

agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

Wrecking, etc., crews.

Enforcement.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

Effective.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Public, No. 274, approved March 4, 1907, 11.50 a. m.
(34 Stat. L., 1415.)

O

Supreme Court, U. S.
FILED
NOV 28 1910
JAMES H. McKENNEY,
Clerk

In the

Supreme Court of the United States

October Term, 1910.

No. 503

THE UNITED STATES,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

Solicitor General,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 504

THE UNITED STATES,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT.

Under a statute ostensibly passed to promote the safety of employes and travelers upon railroads "by limiting the *hours of service* of employes thereon" and thus intended to obviate dangers resulting from overwork, the Railway Company, respondent, was, under a peremptory instruction of the Judge of the District Court trying the case, convicted of an alleged offense because it permitted a telegraph operator to work only nine hours in a 24-hour period but

spread the hours of duty over a twelve hour period by requiring such operator to lay off from work for three hours during such period, whereas if it had not given him a recess or intermission from duty of three hours, and had worked him continuously for nine consecutive hours, the government officials would not have felt offended; that the strain otherwise incident to constant or continuous work would be relieved by giving an intermission of three hours was apparently regarded as unimportant in determining whether he would be unfit for further duty. It would seem to be contended that the real aim of the law was the uneconomical one of requiring railways to employ more operators than necessary or required to do the work safely rather than to see that such operators were not kept at work for so many hours a day that there would be danger to the traveling public resulting from the dulling of the senses due to constant application at work.

Again, according to the ruling of the District Judge, the Railway Company seems to have mistaken the meaning of the words "continuously operated" used in a proviso found in the statute as applied to a telegraph office as not also including one intermittently or interruptedly operated. Thus, an operator at the small station of Corwith, where the duties were light and those in connection with the operation of trains but casual, and where the necessities of business did not require it to be kept open during the entire day and night was put on a parity with an operator in the Train Dispatcher's office of the division where the duties are constant, exacting

and continuous, and where the office must be kept open at all hours of the day and night.

The main line of railroad of respondent runs from Chicago in a southwesterly direction through various states and territories. Corwith is the name given to the yards of the Railway Company which are located in the outer limits of the City of Chicago. At this place the Company maintains a building accommodating an agent and some employes, and in a separate room in the north end of the upper story of that building is the telegraph office. (Rec., 14-25.) It contains telegraph instrument which taps a wire from the Train Dispatcher's office at Chillicothe, Illinois, upon the Illinois Division and other wires. (Rec., 14, 17, 20, 21, 24.) And it also contains a local telephone which does not, however, connect with the Train Dispatcher's office. (Rec., 17-20.)

Corwith is not on the main line of railway, but is located at the end of a spur which connects with the main line at a place called Corwith Junction, and is distant from said junction about half a mile. (Rec., 25, 20.) At this yard ordinarily two freight trains daily are made up. One, No. 39, an interstate train for California. The other, No. 51, a local train running between Chicago and Streator, Illinois. These trains run from Corwith to Corwith Junction, where they pass to the main line. In rare instances other trains might be made up there, but all other trains of the Company make up at Chicago or the Eighteenth Street Yards of the Company on the main line. (Rec., 15, 16, 20.)

Train No. 39 is scheduled to leave Corwith at about

noon. Train No. 51 is scheduled to leave Corwith at 6:45 A. M. These are both freight trains, as stated, and are sometimes started out ahead of their scheduled time by running them as extras. Thus, as is always the case, No. 39 would actually leave Corwith about 11:30 A. M., running not as No. 39, but as an extra, and the same is true of train No. 51. The order from the Train Dispatcher's office for No. 39 was always received at Corwith at 11:30 or 11:40 A. M. That for No. 51 at 6:45 A. M. *No passenger trains are operated by or past this station or office.* (Rec., 20.)

At 6:30 o'clock in the morning an operator goes on duty at Corwith. He receives from the Train Dispatcher located at Chillicothe a clearance order for train No. 51 which simply permits train No. 51 to leave the terminal. (Rec., 15, 16, 20.)

The railroad is double tracked from Chicago to Streator and the rules require trains to run in the current direction of traffic keeping on the righthand side. The object of the clearance order is simply to require a freight train moving west to get out of the way of a passenger train moving west as soon as the passenger train catches up with it. (Rec., 20.)

After having received this one order from the Train Dispatcher the operator then busies himself with business of what may be termed a general nature,—that is, he receives orders from the yardmaster or from the agent, or from some other local official regarding the placing of empty cars along spur tracks or the putting of certain cars into trains, all

being business which is easily distinguishable from the business of train dispatching. (Rec., 20-21-24.)

About 11:30 a. m., this operator takes another train order which allows train No. 39 to clear Corwith. (Rec., 20.)

At noon time the operator is required to go off duty. He pulls a plug from the keyboard in the telegraph office, which disconnects the telegraph wire from the train dispatcher's office and every other station on the line. He locks the door and closes the telegraph office. (Rec., 17-18-20-21-24.) He is then at liberty to do exactly as he likes, except to work for the company (Rec., 18), until 3:00 p. m., when he goes back to the office, opens the door, connects the telegraph wire and spends the remainder of his time in handling the ordinary commercial business of the company. (Rec., 17-18-20-21-24.) Only in exceptional cases would this man receive a third telegraph order from the train dispatcher of the Illinois division of the railroad located at Chillicothe regarding the movement of trains. (Rec., 16-20.)

At 6:30 p. m., this operator goes off duty, being relieved immediately by the night man, who then starts in. (Rec., 14-17-18-20-21-24.) Ordinarily the night man would receive no order at all from the train dispatcher, unless sometimes the order to run No. 51 might come during the night man's trick. He spends his time until midnight transmitting and receiving messages in regard to the general business of the company and at midnight he pulls out the plug, disconnects the instrument from all other instruments and wires and is out of connection with all

wires until 3:00 o'clock a. m. During the interim he closes the office and may do as he likes. (Rec., 14-17-18-20-21-24.)

Each operator, therefore, works exactly nine hours, but the nine hours, as stated, are broken by the three hours' intermission.

By referring to the time table, which was put in evidence (Rec., 19), it will be observed that only these two freight trains, No. 39, a second class freight, and No. 51, a third class freight, make up at Corwith. All other trains running on the Illinois division make up on the main line, with only the occasional exception which we have mentioned before. All of the passenger trains of the Railway Company make up in the City of Chicago and run along the main line to their destination. *No passenger train passes Corwith,—no passenger train could receive an order from the operator at Corwith. No freight train which is made up at Chicago or the* 18*th street yards passes Corwith and no such trains could receive a train order at or from Corwith.* (Rec., 20.)

On the railway timecard (Rec., 19), opposite "Corwith," appears the symbol letter "N," which means, according to the timecard, "night and day telegraph office," but as was stated before, the train dispatcher has a list of the office hours of all stations, and had, at Chillicothe, a list showing that the office hours at Corwith were precisely as testified to. The timecard did not pretend to state that this office was *continuously* operated night and day.

It will thus be seen that the bulk of the work done

by these two men pertains to general railroad business other than the movement of trains, but during each day and some nights, one or two freight trains pull out of Corwith, and this train movement is in compliance with clearance orders telegraphed in each instance by the train dispatcher at Chillicothe, Illinois, and delivered by the operator at Corwith to the train crew. (Rec., 16-20-21-22-24.)

For safety in operation the railroad is divided into a number of divisions and upon each division is located the train dispatcher's office from which office the movement of all trains upon the given division are regulated and directed. The dispatcher's office at Chillicothe, Illinois, alone has jurisdiction of train movements over the Illinois division which runs from Chicago to Ft. Madison, Iowa. (Rec., 25.) There is only one train dispatcher's office on the division, as necessarily the movement of trains passing each other on that division could be regulated by only one man or office during any period. (Rec., 25.) The duty of the train dispatcher is to issue instructions with reference to the movement of all trains on the division and to keep a record of the arrival and departure of the different trains at the different stations, and to issue the necessary instructions relative to their movement. These instructions are issued to the conductors and engineers of the trains through the operators at the different stations which may be passed. The ordering of the trains which are passing each other must be governed by one man, and that one man on the Illinois division is the chief train dispatcher at Chillicothe, Illinois. (Rec., 25-26.) That office is, as it must be, always open for

the receipt of telegrams from various stations concerning trains passing the same, etc., and for the issuance to the various operators of the different stations orders concerning the movement of trains past or from such station. (Rec., 25 & 26.) It is, as it must be, "*continuously operated night and day.*" (Rec., 26.) At all times during the day and the night there must be a train dispatcher with his assistants in control of that office and the wires therefrom. (Rec., 26.) At Chillicothe the dispatchers have knowledge of the office hours of the Corwith station, as they have of the office hours of all other stations on the division. (Rec., 26.) As was said by Witness Forsythe (Rec., 26):

> "The train dispatcher is the nerve center of the system which he has under his control. The nerves are the telegraph wires running out from him to each station on the road. When I say there is only one train dispatcher, that means purely and simply that there is only one man who has control of the issuing of train orders to the entire system or division under his control."

It will thus be readily seen that there is a marked difference between the nature of the duties of an operator at such a place as Corwith and those of an operator in the train dispatcher's office of that division. In the former the duties are light and casual; in the latter the duties are constant, requiring continuous application and watchfulness.

Notwithstanding the foregoing undisputed facts the trial judge peremptorily instructed the jury to find for the government and refused to give various instructions requested by the railway company. Such

ruling was reversed by the Circuit Court of Appeals. (*A. T. & S. F. Ry. Co.* v. *U. S.*, 177 Fed., 114.)

As the case is here upon writ of *certiorari* to the Circuit Court of Appeals we presume it will be heard upon the record in that court and that the assignments of error made by the railway company therein are for consideration here.

The importance of an early and careful consideration of this case will be apparent from the circular letter addressed by the Secretary of the Interstate Commerce Commission now appearing as special counsel for the government, which letter was addressed to the defendant as well as other railway companies, and a copy of which is hereto attached as an "Exhibit." Of course, the suggestion in that communication that the granting of the writ of *certiorari* in this case showed the views of this court as condemning the position taken by the Circuit Court of Appeals was altogether unwarranted, since the respondent in this case made no objection or opposition to the petition for the writ of *certiorari* filed by the government. On the contrary respondent welcomed that application because if granted it afforded it the opportunity to again discuss certain questions not decided by the Circuit Court of Appeals.

The following errors were specified in the Circuit Court of Appeals and for convenience we again specifiy them for the full consideration of this court:

Errors Relied Upon.

The District Court erred as follows:

1. In overruling the defendant's motion at the conclusion of all the evidence to direct the jury to return a verdict of not guilty and in refusing defendant's request to instruct the jury to find the defendant not guilty. (Transcript, pages 26-27.)

2. In refusing to give the jury the defendant's second requested instructions, as follows:

> "The jury are instructed as a matter of law, under the pleadings and evidence in this case, that Corwith was not a tower, office, place or station continuously operated night and day." (Transcript, page 27.)

3. In refusing to give the jury defendant's 4th requested instruction, as follows:

> "The court instructs the jury that the words 'continuously operated night and day' are to be construed in their ordinary acceptation. The word 'continuously' means without cessation, interruption or intermission and qualifies the word 'operated,' and you are therefore instructed that the phrase 'continuously operated night and day' refers to those stations on the railroad which would be operated without cessation, interruption or intermission either day or night.
>
> And you are further instructed that if the evidence shows that during the time specified in the petition in this case for a space of time the station at Corwith was not under the law in question operated continuously day and night, or was operated only a part of the day time and a part of the night time, or that there was a cessation, interruption or intermission in its opera-

tion as a tower, office, place or station from which any operator, train dispatcher or other employe of said defendant during the time specified in the petition in this case, by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements of this defendant, then such station of Corwith was not one continuously operated night and day and the defendant would be under no obligation to limit the time during which it should allow its employes to be or remain on duty to nine hours in any 24-hour period, and you must, under the pleadings and evidence in the case, find the defendant not guilty." (Transcript, page 28.)

4. In refusing to give the jury defendant's eighth requested instruction, as follows:

"The jury are instructed that the burden of proof is upon the United States to show that Corwith was on the dates alleged a tower, office, place or station, of this defendant, from which any operator, train dispatcher or other employe of defendant by the use of telegraph or telephone dispatched, reported, transmitted, received or delivered orders pertaining to or affecting train movements of this defendant, continuously operated night and day, and unless the United States proves that said Corwith was such a tower, office, place or station of this defendant continuously operated night and day, you must under the pleadings and evidence find the defendant not guilty." (Transcript, page 29.)

5. In refusing to give the jury defendant's 8-a requested instruction, as follows:

"The court instructs the jury that the burden is upon the United States of America to prove that Corwith station is a station continuously operated night and day and that the said defendant permitted a telegraph operator to be or

remain on duty for a longer period than nine hours in any 24-hour period in such station, and you are further instructed that the law does not require that the nine hours during which it is permissible for a railway company to require or permit an operator to be or remain on duty, must be consecutive hours; but the only obligation upon said railway company at such station is to refuse to allow or permit a telegraph operator to remain on duty at such station for more than nine hours in any 24-hour period." (Transcript, page 29.)

6. In refusing to give the jury defendant's ninth requested instruction, as follows:

"The jury are instructed that if you find Corwith station was a station continuously operated day and night, and if you find the defendant required or permitted the said employes to be and remain on duty for nine hours in a 24-hour period, then you are further instructed, that such nine hours need not be consecutive, and if said defendant required or permitted said employes to be and remain on duty not longer than nine hours in any 24-hour period, then you must find the defendant not guilty." (Transcript, page 30.)

7. In refusing to give the jury defendant's 12th requested instruction, as follows:

"The jury are instructed that if you find Corwith was a station not operated continuously night and day and not operated only during the daytime, then the law allowed the defendant to require and permit said employes to be or remain on duty for a period not longer than sixteen consecutive hours, and under the pleadings and evidence in the case you must find the defendant not guilty." (Transcript, pages 30-31.)

8. In refusing to give the jury defendant's 13th requested instruction, as follows:

> "You are instructed that under the pleadings and evidence in this case, you are not to consider the hours from 12 noon to 3 p. m., and from 12 midnight to 3 a. m., as hours during which said employes were permitted or required by said defendant to be or remain on duty and in computing the time said defendant required or permitted said employes to be or remain on duty you must exclude the hours from 12 noon, to 3 p. m. and from 12 midnight to 3 a. m." (Transcript, page 31.)

9. In refusing to give the jury defendant's 15th requested instruction as follows:

> "The court instructs the jury that if you find that Corwith station was not a station continuously operated day and night and that it was not a station operated only during the daytime, then you are instructed that the defendant is guilty of no violation of the law unless it permits an employe to be or remain on duty for a longer period than 16 consecutive hours, and you must find the defendant not guilty." (Transcript, page 31.)

10. In peremptorily instructing the jury as follows:

> "The court directs you to return a verdict finding the issues in this case for the plaintiff on the first, third, fifth and seventh counts of the petition." (Transcript, page 32.)

11. In overruling defendant's motion in arrest of judgment. (Transcript, page 32.)

12. In entering the verdict of guilty returned by the jury and imposing a fine of $100 and costs against the defendant thereon. (Transcript, page 32.)

ARGUMENT.

Each and all of the errors relied upon are embraced in the succeeding discussion as to the true interpretation of the statute involved, which will be considered under two main headings.

Under a proviso in a statute which fixed sixteen hours generally of labor for all employes engaged in train movements and which proviso reads: "No operator, train dispatcher * * * shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices * * * continuously operated night and day,"—the trial court in peremptorily instructing the jury and refusing to give the various instructions requested by defendant, determined as a matter of law that the Corwith telegraph office was "continuously operated night and day," although closed three hours during the daytime and three hours during the nighttime.

The trial court also held that the statute forbade defendant from spreading the hours of duty or work in any twenty-four hour period over a longer period of time than nine consecutive hours which would result from the giving to the operator an intermission from duty between the hours of labor, thus including in any period of nine hours of duty the time the operator was off duty as well as the time that he was required to be on duty.

We contend,—First, that the Corwith telegraph office was not "continuously operated night and

day" and did not, therefore, fall within the proviso:

Next, that the practice of the defendant in splitting the hours of service violated neither the letter nor the spirit of the law.

While the Circuit Court of Appeals did not discuss the question whether this office was "continuously operated night and day," but decided the case upon the other point, that there was no violation by splitting the hours of service, if the proviso should be held applicable; yet both questions are involved in this record and are, therefore, for decision. It was for this reason we did not oppose, but rather welcomed the petition for a writ of *certiorari* filed by the government.

I.

THE OFFICE IN WHICH THE OPERATORS IN QUESTION WORKED WAS NOT ONE "CONTINUOUSLY OPERATED NIGHT AND DAY" WITHIN THE PURVIEW OF THE STATUTE AND, THEREFORE, SUCH OPERATORS WERE NOT CONFINED TO NINE HOURS' WORK. THEIR CASE FELL RATHER UNDER THE GENERAL SIXTEEN HOUR PROVISION.

While it is true that on the railway timecard, Corwith station was designated "N", or as explained thereon, as a day and night station, yet there was nothing on the card to indicate that the telegraph office at such station was "*continuously operated night and day.*" On the contrary, the testimony for the government clearly showed that the office at

which the telegraphers in question worked was actually closed from noon until 3:00 p. m., during the daytime and from midnight until 3:00 a. m. during the nighttime, so that the office was one which was operated during a part only of the daytime and during a part of the nighttime—*not continuously but intermittently or interruptedly.*

The Statute Involved.

The statute under which the prosecution was had (Chapter 2939, Vol. 34, Part 1, United States Statutes, at Large, page 1415), is entitled "An Act to promote the safety of employes and travelers upon railroads *by limiting the hours of service of employes thereon.*"

Section 1, after providing that the provisions of the Act should apply to common carriers, their officers, agents, and employes, engaged in interstate transportation, provides at the end thereof "the term 'employes' as used in this act shall be held to mean persons actually engaged in *or connected with the movement of any train.*"

By Section 2, it is made unlawful for any common carrier, its officers or agents

> "to require or permit *any employe* subject to this act to be or remain *on duty* for a longer *period* than sixteen *consecutive hours,* and whenever any such employe of such common carrier shall have been *continuously on duty* for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten *consecutive hours off duty;* and no such employe who has been on duty sixteen hours *in the aggregate* in *any twenty-four hour period* shall be required or

permitted to continue or again go on duty without having had at least eight *consecutive hours* off duty: *Provided*, That no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting *train movements* shall be required or permitted to be or remain *on duty* for a longer period than nine hours *in any twenty-four hour period* in all towers, offices, places, and stations *continuously* operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the *employes* named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

Section 3 makes the carrier, or its officer or agent who may permit "any employe" to remain on duty in violation of the second section, liable to a penalty of not exceeding $500 for each and every violation, to be recovered in a suit brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where "such violations" shall have been committed; and "in all *prosecutions* under this act *the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents.*

It will be observed that but for the proviso in Section 2, telegraph operators being employes "connected with the movement of trains" would in *all* instances have fallen within the sixteen-hour provision.

In the original bills introduced in Congress no

exception was made in favor of telegraph operators or train dispatchers. The proviso which created the exception mentioned was only inserted shortly before the final passage of the law and during closing days of the session. Congress, however, thought it necessary to except from the general provision indicated a certain class of operators for whom it was thought necessary to make some special or different rule and thus, in respect to such parties, to modify or repeal *pro tanto* the general provision governing all employes connected with train movements. There were, however, but two classes or cases excepted from such general provision, according to the language of the proviso:

First, the case of operators or dispatchers put on duty "in all towers, offices, places, and stations *continuously operated night and day.*" For these, a period of time of nine hours *of labor or duty* in any *twenty-four hour period* was fixed;

Second, the case of telegraph operators, etc., put on duty "in towers, offices, places and stations *operated only during the daytime.*" For these, *thirteen* hours *of labor or duty* was fixed.

The first exception above stated covers the case of the train dispatcher's office on each division controlling and regulating the movements of all trains thereon and which must of necessity be constantly kept open for the receipt of telegrams from all stations on the division as to the movement of trains thereon and for the issuance of orders to the various stations or offices necessary for the safe movement of all trains upon such division. That office could

not be, in the nature of things, closed at any time for any period either day or night. It must be "continuously operated night and day." There are other offices and towers at important points on the main line of a railroad and especially at the crossings of other railroads where the business of the railway company requires the telegraph office or tower to be continuously (that is without intermissions) operated day and night. At these offices the duties of the operators and dispatchers are necessarily exacting, requiring constant application on their part to be at all times on the watch or lookout to see that proper orders are issued or transmitted for the movement of trains and that proper care is taken of all advices (telegrams) received from various points on the divisions as to such trains.

At other stations operated only during the daytime the duties of the operator were regarded as, and in fact are, not so exacting. Such station or office is not a central point at which there would be a great number of dispatches received and transmitted as the dispatches there received or transmitted would concern only the movement of trains at such particular station.

There was then obviously left another class of offices or stations not dealt with in the proviso, that is, offices or stations where the business in respect to train movements would be so light and casual that it would not be necessary to keep the same open at all times both day and night, nor even during the entire daytime, but the business thereat could well be transacted by keeping such offices open dur-

ing a part only of the daytime and a part only of the nighttime. In the western part of this country, and especially in the desert regions which are sparsely settled and where the transportation business is exceedingly light and where trains pass the various stations at regular intervals, it is only necessary in the proper operation of the railroad to keep the telegraph office therein open or operated during but a few hours of the daytime and but a few hours of the nighttime.

Again, upon branch lines where the business is comparatively light and upon which frequently but a single train is operated each way it is only necessary for the safe operation of such branch to keep the telegraph office at the different stations thereon open but a part of the nighttime and but a part of the daytime. That was peculiarly the case at Corwith which was located a half mile or more from the main line and past which there would not be a great number of freight trains, and no passenger trains, operated.

Again, we might mention that at some stations in some localities it would only be necessary in the operation of the railroad to have the telegraph office open or operated for but a few hours during the nighttime. Concerning such cases as at such places it was not at all likely operators could be overworked, Congress did not deem it necessary to make any special provision.

Such cases not being specifically dealt with in the proviso in the second Section of the Act would necessarily fall within the general provision governing

all employes "connected with the movement of any train."

Looking at the Act from a practical railroad standpoint, and supposing that it was passed with the intention to save human life without unduly harrassing the railway companies, it will be observed that the engineer and the conductor of a train, who would receive and carry out orders for the movement of the train, might be permitted to work sixteen consecutive hours and yet their duties would be of great responsibility and exactness, requiring attention and alertness the greater part of the time they would be on duty. Is it not absurd to say that Congress which allowed these men to work sixteen consecutive hours thought the business of a telegraph operator who sat in a way station or office taking two or three train orders a day was so oppressive and hard that he should be allowed to work but nine hours a day?

It would not be fair to say that Congress intended that operators working at offices which the necessities of the business of the carrier did not require to be *continuously operated* day and night and where the duties were not exacting but rather light, should not be permitted to work longer than operators in the train dispatcher's office on the same division whose duties are of such a constant and exacting nature. Would it not be absurd to say that Congress intended to put these operators upon a parity and that the words "*continuously operated*" were used inadvisedly or incorrectly?

Surely Congress did not intend to prescribe the

same limit of hours of labor in favor of operators whose duties are light and intermittent, who receive or send but few dispatches, and who are not required to give constant attention to their business, as that prescribed for train dispatchers whose duties are numerous and constant and require the most exacting care and vigilance, and who are located in offices where the dispatches received and orders given and transmitted for the movement of trains on the division are enormous.

Again, Congress provided that as to offices or stations operated only during the daytime, and that would include, of course, the entire day, the operator there might be kept on duty for thirteen hours. Is it reasonable to suppose then that in an office operated only a part of the daytime and only a part of the nighttime it would be unlawful to permit the operator thereat to work less than thirteen hours? The day operator at the Corwith office in question only worked nine hours in the aggregate during the daytime, yet at an office operated during the entire daytime, an operator might be kept on duty for thirteen hours, or the entire time it would be open.

It would seem plain that if Congress intended to except *all telegraph operators* from the sixteen hour provision, apt words would have been used to express that idea, and appropriate provision would have been made to cover *all classes* of telegraph offices instead of the existing provision which merely covers in terms but two classes.

Meaning of "Continuously Operated."

The office at Corwith was not "*continuously operated* night and day." The word "continuously" necesarily qualifies the word "operated" and, in its usual as well as correct meaning, is satisfied only by a station or office operated "without cessation, interruption or intermission" both during the night and daytime. Supplying the words which are necessarily omitted for the sake of brevity, the phrase would read, "offices, etc., which are continuously operated during the night and daytime." The Standard Dictionary defines "continuously" as "*without cessation, interruption or intermission.*"

See, also:

State v. *Vanderbilt,* 37 Oh. St., 598.
Black v. *Delaware, Etc., Canal Co.,* 22 N. J. Eq., 402.

In 9 Cyclopedia of Law and Procedure, page 212, the word "continuously" is defined as "without interruption; unbrokenly; without break or interruption."

In *Garrison* v. *United Railways Co. of Baltimore,* 91 Md., 347, 55 Atl., 372, the Court of Appeals of Maryland construed the following language of a statute relating to the use of transfers by passengers on a street railway:

> "Provided, that such company shall give a free transfer, when the same shall be requested, upon the pavment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for *a continuous ride.*"

And said, in holding that the company had a right

to limit the time within which the transfer should be accepted on a connecting line:

> "*A continuous ride* does not mean a ride interrupted by a considerable delay of time."

In *People* v. *Sullivan,* 9 Utah, 195, 33 Pac., 701, the court said in part:

> "*To render an act continuous, its performance must be carried on without interruption,* for when its performance ceases the act is complete and distinct; and if afterwards a similar act is performed, it cannot be regarded as a continuation of the former. To make it continuous, it must be the result of a single impulse and performed or carried on without intermittence. Wharton's Crim. Pl., Secs. 474, 476."

The only case which was cited by the government below construing the word "continuously" as used in the statute was that of *Hodge* v. *U. S. Steel Corporation,* 64 N. J. Eq., 807, 54 Atl., 1, but there the context of the statute plainly showed that the word was improperly used in the sense of regularly or consecutively. The statute provided for the case of a corporation which "shall have continuously declared and paid dividends at such rate on such preferred stock for a period of at least one year next preceding the meeting." Dividends declared and paid by corporations as a rule are not declared and paid daily but only at fixed intervals, either monthly, quarterly, half yearly or yearly. Thus it is evident that in the statute there construed the word "continuously" was improperly used for "regularly." it was, however, stated in that case that if one of the quarterly dividends were omitted the case would not fall within the above quoted provision. But the stat-

ute involved in the case at bar constantly speaks of *"hours of duty."* It also refers to *"continuously on duty"* in connection with *consecutive hours of duty.*

An office is of course only operated when the operators are on duty. It is, therefore, evident that the words "continuously operated" have reference to the continuity of hours of operation or of duty during the day and nighttime.

The continuity of operation required does not of course refer merely to the sequence of day and night, for "as the night followeth the day," it would be quite absurd and unnecessary to provide for such sequence. The adverb "continuously" would be wholly unnecessary in the sentence unless it had reference to the hours of operation,—that is, the continuity of operation of the office, both during the nighttime and during the daytime. The time of operation must be continuous during both periods.

In the other case cited by the government below, *City of El Paso* v. *Bank,* 71 S. W., 799, decided by a Texas Court of Civil Appeals, an inferior court, the word "consecutive" and not "continuous" was construed. There a trust deed required notice of sale to be published for "ten *consecutive days"* in some daily newspaper published in El Paso. Publication was made for ten successive week days, but publication was omitted from a Sunday edition of the paper, which did not publish such notices. Of course the parties plainly contemplated that a publication for ten consecutive days could only be had in the week day issues of the paper as such notices would not be published on Sunday. Sunday would

be regarded as "*dies non juridicus*" and therefore not to be counted as a day upon which it would be contemplated a notice should be given either by virtue of some contract or statutory provision. (*Rasmussen* v. *People,* 155 Ill., 70.)

But under a statute which required notice to be published at least five successive days, a certificate which stated that it had been "published five times," etc., was held defective. (*Toberg* v. *City of Chicago,* 164 Ill., 752.) So where the certificate of publication stated the notice was published five times in a daily newspaper, the first and last papers containing the notice being dated respectively, April 30th and May 5th. *Held,* that this failed to show that the statutory notice had been given. (*Casey* v. *People,* 165 Ill., 49.)

In the case of *Washington* v. *Bassett,* 15 R. I., 563, 10 Atl., 625, heretofore cited by the government, provision for sale contained in a mortgage required "first giving twenty days' notice of such sale in some one of the public newspapers printed in said City of Providence." The notice was to be published for a number of days, but not on consecutive days, and was therefore held to be insufficient.

The word "continuously" in the above connection was advisedly used by Congress, and used in its correct acceptation. Thus, in a preceding part of the same section we find language used forbidding keeping on duty of an employe for a longer period than sixteen *consecutive* hours and "whenever any such employe * * * shall have been *continuously on duty* for sixteen hours," etc., plainly showing the

word "continuously" is used with reference to "*consecutive hours.*"

To hold that the proviso covered also an office operated during only a part of the daytime and during only a part of the nighttime would be to hold that the word "continuously" was superfluous and meaningless; yet it is the duty of the court in construing a statute to give some meaning to every word found therein. It is also the duty of the court to construe words according to their usual and accepted meaning. To do so in this case is merely to make a distinction between classes of operators which Congress evidently intended to make, and to confine the exceptional nine hours provision to operators whose duties would be constant and exacting, requiring the utmost of care and vigilance. To put in the same class by construction those operators whose duties would necessarily be light and somewhat casual, would be to attempt to convict Congress of making an absurd regulation and by such construction render a statute, beneficial in its nature and purpose of design, so harsh and unreasonable as to make the motive for its passage unintelligible.

It was said, however, by the trial judge that the law was not intended to permit a railroad company to close an office for fifteen minutes and thus avoid the provision in question. It is perhaps sufficient to say that the time this office was closed, both during the day and the night time, was substantial—six hours out of the twenty-four, or one-fourth of the time. It is not to be assumed that in respect to offices, which, from the nature of the business, must

be continuously operated both day and night that the railroad companies would close the same for a fraction of an hour to avoid the provision in question. It is safe to say that the offices referred to in the Act as "continuously operated" could not be closed even for a fraction of an hour without entailing so great a loss upon the carrier itself in the conduct of its business that the practice would not be adopted. It will not do to put extreme or impracticable cases as an illustration of what might be done. It is sufficient to say that the practical operation of a railroad will of necessity require certain offices to be operated either continuously or during certain periods of the day or night, and that a change could not and would not be made by a railroad company in respect to the same merely to illustrate some possibility of evading the law. Referring to such extreme illustrations Mr. Justice Story said, in *U. S.* v. *Dickson,* 15 Peters, 164:

> "Suppose it might be so, it would be a case of very rare occurrence; and to put an extreme case is not a good test of the fair and just interpretation of any statute."

Again, would the learned trial judge say that an office closed four hours during the daytime and four hours during the nighttime was "*continuously operated?*" Then, how about an office closed six hours during each period, or one-half the time? And how about an office in the desert or upon a branch line at which the business is so casual that it is necessary to keep the same open only at times aggregating four hours in the daytime and say two hours during the nighttime? Is that office "continuously operated night and day"?

Provisos or exceptions strictly construed in taking cases out of general provisions.

While it is well settled that all parts of a statute should be reasonably and sensibly construed, yet in arriving at such reasonable construction it is also well settled that a proviso in a statute, creating an exception to the enacting clause of such statute, and making special provision for a special class which would otherwise have fallen under the general provision of such enacting clause, is necessarily to be strictly construed, that is, confined to the words used therein according to their usual acceptation. No case is to be taken out of the general provision and placed within the proviso or exception thereto unless it comes plainly within the language thereof.

In *U. S.* v. *Dickson,* 15 Peters, 158, which has been frequently cited with approval, it was said by Mr. Justice Story for the court, on page 165:

> "Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; *and those who set up any such exception must establish it as being within the words as well as within the reason thereof.*"

In *Savings Bank* v. *U. S.,* 19 Wallace, 228, it was

held that a proviso should not be construed to be repugnant to the body of the act; that it is not to be extended to cover or take out from the body of the act subjects not plainly within its language. In that case the court declined to follow a construction placed upon the statute by the Commissioner of Internal Revenue. (See pages 236 and 237.)

Indeed, by making special exception in the proviso in favor of operators at offices or places continuously operated night and day, and in favor of operators at offices and places operated only during the day time, there is a presumption that Congress did not intend to create any other exceptions to the general provisions of the law. Courts cannot suppose omissions were not intentional, and undertake to supply the same.

See:

U. S. v. *Colorado & Northwestern Ry. Co.*, 157 Fed., 321.

State v. *C. C. C. & St. L. Ry. Co.*, 157 Ind., 288; 61 N. E., 669-670.

In re Herring, 117 N. Y. Suppl., 747, citing Sutherland on Statutory Construction, Section 328.

To the suggestion that it would be absurd to place in the sixteen-hour class operators who worked in offices open or operated during a part only of the daytime and a part only of the nighttime, while an operator at an office operated during the daytime would be permitted to work only thirteen hours, we would say that it seems to be forgotten that thirteen hours of constant work would be harder, more tire-

some and irksome and cause a greater strain than sixteen hours of aggregate work in which there would be an intermission for recreation and in which the operator would be entitled to at least eight consecutive hours off duty. As a practical proposition, no operator at an office open but a part of the day and a part of the nighttime would in fact be on duty sixteen hours in a twenty-four-hour period because such an office would require the services of at least two operators. But is it not absurd to contend that an operator working only nine hours during the entire daytime, as was the case of the day operator at Corwith, should be given a shorter shift to say the least than an operator working constantly for thirteen hours during the daytime at a station which happened to be operated only during the daytime?

Penal statutes strictly construed.

Again, the statute in question is highly penal, subjecting any officer or agent of any common carrier, as well as the carrier itself, to "prosecutions" for heavy penalties for each offense, and as to the carrier is found the unusual provision, "in all *prosecutions* under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents";—in other words, the carrier would have to be invested with prescience as well as omnipotence to avoid prosecutions.

The statute should, therefore, be construed strictly. The proviso in question cannot be considered as embracing cases which do not fall within the fair meaning of the language used.

In *Robinson* v. *Harmon,* 157 Mich., 266, 278, 122 N. W., 106, it was held that a statute though also remedial should be construed strictly to the extent it operated against an alleged offender.

In *People* v. *Weinstock,* 193 N. Y., 481, 86 N. E., 548-549, it was held that in construing penal statutes courts should not attempt to spell out the creation of an offense which is not clearly indicated by the ordinary meaning of the words used in its provisions.

In *Nance* v. *Southern Railway,* 149 N. C., 116, 63 S. E., 116, it was held that a court cannot extend the meaning of a penal statute, though there be manifest oversight in the legislature.

In *U. S.* v. *Harris,* 177 U. S., 305, 309, in which it was held that a receiver of a railroad was not within the letter or spirit of the act of Congress governing the transportation of cattle generally known as the 28-hour law, and imposing penalties for violations. On page 310 the language of Chief Justice Marshall in a former case is quoted with approval:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. But this is not a new, independent rule which subverts the old. It is a

> modification of the ancient maxim and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."

In *Bolles* v. *Outing Company,* 175 U. S., 265, it is said:

> "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice."

On page 268, the court continued:

> "Had Congress designed the extended meaning claimed for these words 'found in his possession,' it would naturally have used the expression 'found or traced to his possession,' or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

In *Lau Ow Bew* v. *U. S.,* 144 U. S., 59, it is said:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

In that case it was held that a statute providing that every Chinese person other than a laborer, etc., who shall be about to come to the United States should obtain permission of and be identified as so

entitled by the Chinese government, did not apply to Chinese merchants already domiciled in this country, who, having left the country for temporary purposes with the intention of returning and sought to re-enter on their return to their business and homes.

In *Chicago Northwestern Railway Company* v. *Dey,* 35 Federal, on page 876, it was well stated by the late Mr. Justice Brewer:

> "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St., 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' See, also, *U. S.* v. *Sharp,* Pet. C. C., 122; *The Enterprise,* 1 Paine, 34; Bish. St. Cr., Section 41; Lieb. Herm., 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows:
>
> 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.'"

See, also, the opinion of the same learned justice in *Tozer* v. *United States,* 52 Federal, 917, 919.

Penalties are not to be extended by construction.

A., T. & S. F. Ry. Co. v. *People,* 227 Ill., 270, 278.

State v. *C. C. C. & St. L. Ry. Co.,* 157 Ind., 288; 61 N. E., 669-670.

The court cannot supply supposed omissions in the proviso.

Again, it will not do to suppose that the omissions from the proviso were not intentional, and that, therefore, it is the duty of the court to supply the same and thus re-enact a different statute.

In *Hobbs* v. *McLean,* 117 U. S., 579, it is said on page 580:

> "The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision, subject to certain well-defined exceptions, but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. 'We are bound,' says Mr. Justice Buller, in *Jones* v. *Smart,* 1 T. R., 44, 'to take the act of parliament as they have made it'; and Mr. Justice Story, in *Smith* v. *Rines,* 2 Sumner, 338, 354, 355, observes, '*It is not for courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation.*' "

See, also,

U. S. v. *I. C. R. R.,* 170 Fed., 549.

D. L. & W. R. R. v. *Interstate Commerce Commission,* 166 Fed., 498; affirmed 216 U. S., 531.

In the case above cited, *State* v. *C. C. C. & St. L. Ry. Co.,* the court said:

> "While the rule of strict construction will not sanction the abridgement of the manifest

intention of the legislature it must be said that it requires the solution of doubts and ambiguities against the infliction of penalties and forbids the exaction when the right is not clearly apparent from the terms of the act itself. The court must interpret such a statute as it finds it. It cannot supply omissions by intendment."

It was pertinently said by the court in *Konda* v. *U. S.*, 166 Fed., 91, on page 93:

"It is for Congress not for the courts to make the addition to the penal code."

The court cannot suppose, therefore, that the proviso was intended to cover all cases of all telegraph operators.

II.

BUT IF THE NINE-HOUR PROVISION WERE APPLICABLE YET DEFENDANT WOULD NOT BE LIABLE, SINCE IT DID NOT PERMIT OPERATORS AT THIS OFFICE TO BE ON DUTY LONGER THAN NINE HOURS IN ANY TWENTY-FOUR-HOUR PERIOD AND THE LAW DOES NOT FORBID A SPLITTING OF THE TIME OR ADJUSTMENT OF THE HOURS OF SERVICE.

Assuming, in the argument which follows, that the words "continuously operated" were not used in their usual signification but were incorrectly used, and that, therefore, the Corwith office was "continuously operated," the question would then arise whether it would be unlawful to permit an operator in such office to work only nine hours in the aggregate in a twenty-four period when it is admitted it would not be unlawful to permit him to work constantly for nine hours in such period. It is claimed

that it would be unlawful for the defendant to permit an operator at Corwith working during a part of the daytime only to work nine hours in the aggregate within a twelve or twenty-four hour period, but that it would not be unlawful if the hours of service were made continuous and he should be required to work from 3 P. M. until midnight and the other operator would be required to work from 3 A. M. until noon of the following day. By the latter plan two men would be inconvenienced by being required to work a great part of the nighttime as well as a part of the daytime, whereas, by the former method of splitting the hours of service there would be no inconvenience since an operator who preferred day work could have the same while one who preferred night work could have that kind. What language is there in the act to justify such an absurd distinction?

The manifest purpose of the law was to fix the number of hours of labor required and not the period within which by agreement the given number of hours of labor should be performed, beyond the limit prescribed of "any twenty-four-hour period."

The language of the proviso is—"no operator * * * shall be required or permitted to be or remain *on duty* for a longer period than nine hours in any *twenty-four-hour period* in all offices," etc., "continuously operated night and day," etc. The district judge held that when an operator was permitted to go on duty the period of duty commenced and that he could be kept on duty but a single period, no matter how short, during any twenty-four-hour

period. Such construction would necessarily eliminate all opportunity for meal hours. The trial court held that the words "longer period than nine hours" emphasizing the word "period" and giving to it a narrow construction meant a single space of time. In doing so he ignored altogether the salient fact that the period referred to was a period of duty or labor and not a period which embraced the time of duty and also the time for rest or recreation.

But Congress did not use the word "period" in connection with the words "nine hours" in the sense of a single or isolated space of time, but rather in the general sense of "time" or its synonym "limit," referring to a number of hours, either consecutive or in the aggregate, but only in connection with work or duty. Thus, in the same section we find Congress using the words "for a longer *period* than sixteen *consecutive* hours." Now, if the word "period" were used to denote a single space of time, then the word "consecutive" would have been superfluous and unnecessary, but as Congress was at pains to use the word "consecutive" following the word "period," this plainly indicates that it did not understand the word "period" standing alone to refer only to "consecutive hours."

Nor is this use of the word "period" exceptional in congressional legislation. In Chap. 3594 (34 U. S. Stat, at Large, 607, passed at the same time as the above statute), Section 1, amending and repealing Sections 4386-4387, etc., of the United States Revised Statutes, as well as in those sections, we find language forbidding the confinement of animals

on cars, etc., "for a *period* longer than twenty-eight *consecutive* hours," etc., and "for a *period* of at least five *consecutive* hours." Evidently Congress did not regard the word "period" standing alone as necessarily embracing "consecutive hours," but was at pains to qualify the meaning by inserting the word "consecutive" in these instances.

Again, in a committee report to the house of representatives made by Mr. Esch (Report 7641, 59th Congress, Second Session, on "Limiting the Hours of Service of Railroad Employes"), he reported in lieu of Senate Bill No. 5133 a bill almost identical in language with that afterward passed by Congress except that in the proviso the word "consecutive" was used between the words "nine" and "hours" and between the words "thirteen" and "hours" and between the words "three" and "days," making the phrases read, "for a longer period than nine *consecutive* hours" and "for a longer period than thirteen *consecutive* hours" and "for four additional hours in a twenty-four hour period not exceeding three *consecutive* days in any week."

In the law as finally passed the word "consecutive" in the above clauses was omitted, having been stricken from the bill. Is it not reasonable, therefore, to suppose that in striking out the word "consecutive" in said clauses Congress intended merely to limit the hours of labor "in any twenty-four hour period" whether the hours of labor required should be either consecutive or in the aggregate, provided they did not exceed the number prescribed?

The trial court, however, in its construction ig-

nored not only the great purpose and object of this law, but also entirely ignored the words "permitted to be or remain *on duty.*" Under the act of Congress it is the time an operator is being kept on duty or at work that is sought to be limited or prescribed. The language is clear, having reference to the time or hours of duty and not to the time or hours of idleness or recreation.

But, if we were to give a literal interpretation to the language of this proviso, as the trial court attempted to do to a part only thereof, then it would be manifest that the operator in question was not at any time during any twenty-four period "permitted to be or remain on duty for a longer period than nine hours." Take the case of the day operator. He was permitted to be on duty from 6:30 A. M. until 12 noon, and then went off duty, but this *period of duty* was less than nine hours. When he again went *on duty* at 3 P. M. and remained on duty until 6:30 P. M., here again this *period of duty* was less than a period of nine hours in any twenty-four-hour period.

As heretofore stated, it is perhaps more reasonable to attribute to Congress the intent to fix the *number of hours of labor,* say, in a twenty-four-hour period, than to prescribe a single space of time during which labor might only be lawfully performed, or within which the hours of labor might only be adjusted, beyond that prescribed "in any twenty-four-hour period." *It surely was not intended to prescribe two units of time, one being within the other, during which the number of hours of duty*

or labor might not be adjusted by the parties interested. In order to promote the public safety it might well be permsisible for Congress to say how many hours in a day a railway employe might be required to work, giving him an opportunity to rest the balance of the time, because to require his attention to be kept upon his work for a longer number of hours during a given day might dull his senses and thus render train operation dangerous. But for Congress to undertake to say that the hours of work could only be consecutive and may not by agreement of the parties be distributed within the period of a day, would exceed the limit of police power and seriously impinge upon the liberty of contract.

Lochner v. *New York,* 198 U. S., 45.
Allgeyer v. *Louisiana,* 165 U. S., 578.
Adair v. *U. S.,* 208 U. S., 161.

The object and purpose of the act is manifest in its title. It is to promote the safety of employes and travelers upon railroads "by limiting the *hours of service* of employes thereon." It is the "hours of service" which are sought to be limited.

Even the school boy is taught at an early age that a recess or intermission during school hours for recreation enables him to go back and complete his task much easier than if he had been kept on duty constantly for the same number of hours. Would it not seem to be self-evident that if an operator were kept continuously on duty for nine consecutive hours that during the last hour or the last half hour by reason of his constant application to his duties his senses would be more apt to be dulled

and his attention rendered less acute than if he had been accorded an intermission during his work and the nine hours of labor spread over a twelve-hour period? That very idea is manifest in the very section of the law under consideration. It will be noticed that in providing for a period of continuous duty of sixteen consecutive hours the employe is to be off duty at least ten consecutive hours, while if he were on duty sixteen hours in the aggregate in any twenty-four-hour period he might only be required to be off duty eight consecutive hours. That would demonstrate that in the mind of Congress consecutive hours of duty are more exacting upon the employe than the same number of hours of duty in the aggregate. The difficulty with the trial judge's construction was that he embraced within the term "for a longer period than nine hours" the time in which the operator was required to be *off duty* as well as the time he was required to be *on duty.*

In 22 Opinions of Attorney Generals, page 62, Mr. Griggs, then Attorney General, had occasion to consider Section 7 of the Act of March 15, 1898 (30 U. S. Stat. at Large, 316), containing the following:

> "Hereafter it shall be the duty of the heads of the several executive departments in the interest of the public service to require of all clerks and other employes of whatsoever grade or class in their respective departments not less than seven hours of labor each day except Sundays and days declared to be holidays by law or executive order."

The president inquired:

> "Does the provision of Section 7 aforesaid re-

quiring seven hours of labor each day permit of the allowance of half an hour for luncheon within the seven hours required?"

The attorney general answered:

"With reference to the second question submitted, I answer in the negative. The provision of the Act referred to is that 'the heads of the several Excutive Departments shall require not less than seven hours of labor each day.' *An employe is not engaged in labor when taking his meals, nor when going to or returning from his appointed place of labor.* The proper interpretation of the statute in this respect is that seven hours of service shall be rendered to the Government by the clerks and employes in the Executive Departments, and such service can only be performed by the actual engagement by the employes in their allotted duties or by their readiness at their proper place of business to engage in such duties at any moment they may be required."

In *U. S.* v. *Langston,* 85 Fed., 613, the Circuit Court of Appeals of the Fifth Circuit held that under the Act of May 24, 1888, which provides that letter carriers employed more than eight hours per day shall be paid extra therefor, a carrier was not entitled to extra pay for the short intervals, or "swings," between his trips, when not actually employed in work, and not required to remain in or about the post office. To the same effect see *U. S.* v. *McCrory,* 119 Fed., 862.

As to the contention of the Government that the period of nine hours prescribed as the time or limit for keeping a certain class of operators "on duty" is equivalent to fixing the "period of employment," there would seem to be some distinction. A man

may be employed by the day, week or month, yet he would only be required to be *on duty* for a given number of hours each day. Since in the preceding part of the section the employe is not permited to be kept on duty for a longer period than sixteen consecutive hours nor for more than sixteen hours in the aggregate in any twenty-four hour period without being given a certain number of consecutive hours off duty, it is manifest that Congress was legislating with reference to actual hours of duty or work.

The purpose of the Law as manifested by Committee Reports during its passage.

The purpose and object of this statute is apparent not only from the title of the Act, but is made manifest in Report No. 7,641 to the 59th Congress, Second Session, heretofore referred to, by Mr. Esch, reporting in lieu of the Senate Bill a bill almost identical in language with the present law and upon the subject of "Limiting the Hours of Service of Railroad Employes." He quotes at large from the President's Message and from reports of the Interstate Commerce Commission showing the necessity of legislation to fix the *number of hours* trainmen should be *permitted to work* because of accidents resulting from their being kept constantly at work for an excessive number of hours. It also seemed from this report that a number of large railway companies had already in force agreements with their employes which fixed the number of hours of work, but that nevertheless employes were desirous in instances of working longer in order to get increased

pay. On page 3 he quotes from the President's Message, as follows:

> "The excessive hours of labor to which railroad employes in train service are in many cases subjected is also a matter which may well engage the serious attention of the Congress. The strain, both mental and physical, upon those who are engaged in the movement and operation of railroad trains under modern conditions is perhaps greater than that which exists in any other industry, and if there are any reasons for limiting by law the hours of labor in any employment, they certainly apply with peculiar force to the employment of those upon whose vigilance and alertness in the performance of their duties the safety of all who travel by rail depends."

He continues with another quotation:

> "I call your attention to the need of passing the bill limiting the *number of hours of employment* of railroad employes. The measure is a very moderate one and I can conceive of no serious objection to it. Indeed, so far as it is in our power, it should be our aim steadily *to reduce the number of hours of labor,* with as a goal the general introduction of an eight-hour day."

He then quotes from the 1904 Report of the Interstate Commerce Commission, as follows:

> "The part played by *excessive hours of labor* in causing railroad accidents is a question that calls for serious consideration. The bulletins published by the Commission record many accidents where the employes involved have been *on duty an excessive number of hours,* and many complaints from employes that they have been required to work for excessive periods of time have been brought to the attention of the Commission. There are a few roads that have stringent rules to guard against the overwork-

ing of trainmen, but in most cases the matter is left entirely to the discretion of the men and to subordinate officials immediately in charge. These subordinate officials, in their eagerness to keep traffic moving, frequently overtax the men, and in many cases the men themselves, through greed for making big pay, willingly remain on duty of excessive periods of time. If there is a reason for limiting the hours of labor in any employment it applies with peculiar force to the operation of railroad trains, since the safety of the traveling public is so largely dependent on the alertness and intelligence of train employes."

From the Annual Report of the Interstate Commerce Commission for the year 1905, among other things, he quotes as follows (pp. 3 and 4):

"'Another important feature of railroad operation is the hours of labor of railroad employes, especially of enginemen, conductors, and other trainmen, telegraph operators and signalmen. All these men are constantly charged with delicate and responsible duties, and they should never be on duty except when in good physical and mental condition. The need of a high standard in this respect and of care on the part of supervisory officers to see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules *limiting the hours of work and providing suitable rest periods;* but these rules often appear to be very poorly enforced. Evidence of overwork appears frequently in the accident reports. Besides those cases of men remaining on duty because of wrecks or snow storms or other emergencies, there is much irregularity in everyday train service.

The disposition of men to work beyond reasonable limits of physical endurance for the sake of facilitating the business of the railroad

or to increase their earnings may be seen in other departments than the train service. Signalmen, who usually work regular turns of twelve hours each, sometimes take each other's places in cases of sickness or an unexpected call of a man away from his home, and thus remain on duty thirty-six hours at a time.

This defect in the service, *due to overwork*, is frequently discovered in conjunction with a deficiency of another sort—inexperience. Men who have been but a few months in the service, and who have yet much to learn concerning some features of their duties, should be required to comply with the rest-time regulation with the most scrupulous care; yet it often happens, as has been shown in the accident records, that new men, admittedly less competent for their duties on that account, are the very ones who have been put to the additional test of working overhours.' "

He then quotes from the resolution passed by the Brotherhood of Railroad Trainmen, as follows:

" 'Whereas a large number of railways are requiring their employes *to work an excessive number of hours*, thereby endangering their lives and those of the general traveling public: Therefore be it

Resolved, that we condemn such a practice and urge Congress to enact a law governing the *number of hours of service* to not exceed sixteen hours for all employes engaged in train and yard service, as a large number of accidents that occur on the railroads are directly or indirectly traceable to the fact that employes have been overworked.' "

Mr. Esch then states in his report, as follows:

"Although this bill makes into law agreements now existing between the companies and the various brotherhoods and makes as the maximum of continuous service that which now is left for

> the most part to the wish or consent of the employes themselves, the old and oft-repeated argument was made that the business of railroads was private business, and hence ought not to be subjected to legal restraints. * * * The committee was not persuaded that a *'laissez faire'* doctrine would be effective in promoting the safety of employes and travelers, and hence have recommended the passage of this bill."

On page 6 he continues:

> "A new proviso has been added to Section 2, having particular reference to operators and train dispatchers. The exacting and responsible character of their work and recent terrible railroad disasters attributable directly or indirectly to the negligence or overwork or both of this class of employes induced the committee to restrict their *hours of service.*"

After referring to the provision of this law giving the period of one year before it became operative thus enabling the railroad companies to adjust themselves to its requirements, and after referring to the rest rules of certain railroad companies mentioned, he continues on page 7:

> "More rules of like character on important railways of the United States might be given, but these rules seem to be of the same general character, leaving the matter of excessive hours largely, if not entirely, in the discretion of the men themselves. It is easy to understand how, owing to human cupidity, some employes will always be ready to *work excessive hours,* even though such excess of work may jeopardize the traveling public. In the opinion of the committee, it ought not to be left to the discretion of the men themselves as to whether they shall *work excessive hours or not.* In its opinion, the law itself should fix the maximum limit and provide sufficient penalties for any violation

thereof. Neither the cupidity of the men nor of railway managers should control in a matter of such vital interest to the public safety. * * * Under the present system of agreement between the companies and the brotherhoods, by the terms of which it is largely discretionary with the employe as to whether he shall work hours in excess of his contract or not, traffic managers or those responsible for transportation do not hesitate to discipline men who invoke the aid of their contract in support of rest when called upon to perform excessive hours of labor, and it is the fear of being disciplined and ultimately of being discharged that makes many men work to excess.

The passage of the pending bill will, on the one hand, permit the railroad companies to defend themselves against the cupidity of some of their employes who desire *to work excessive hours* for the sake of an increase in their earning, and, on the other hand, will permit the employes to protect themselves against being disciplined or discharged because of a demand made upon them *to work excessive hours.*"

Thus it is plain that Congress was considering the question of the number of hours of labor which should be fixed and was seeking to prohibit employes from working an excessive number of hours a day.

It would be idle and useless to refer to the debates in Congress upon the various bills pending. They would simply tend to show the individual opinion of the particular speaker, but would not reflect the aggregate sense of the entire body in voting upon the passage of the final bill. Such references would not be enlightening and would not be proper. (*U. S.* v. *Freight Association,* 166 U. S., 291, 318.)

But as to the purpose and object of the law nothing could be plainer than the above extracts from the Committee Report.

A sensible construction should be adopted.

If there be any doubt as to the proper construction of a statute it should not be construed so as to lead to unreasonable or absurd consequences. A statute penal in its nature should not be construed to be applicable to an act otherwise innocent and natural unless such a legislative intent is clear and unmistakable.

East v. *Brooklyn R. Co.*, 195 N. Y., 409; 88 N. E., 751.

In construing a statute whose meaning is doubtful or to be ascertained by inference, the absurdity or apparent inequity resulting from a literal or merely verbal construction is ground to support a broader construction not attended with such results.

In re the Opinion of Justices, ... N. H., ...; 72 Atl., 754.

Market Co. v. *Hoffman*, 101 U. S., 116.

U. S. v. *Kirby*, 7 Wall., 486.

In *Darlington Lumber Co.* v. *Missouri Pacific Ry. Co.*, 216 Mo., 658, 116 S. W., 530, it was held that the legislative intent should be sought when the meaning of a statute is doubtful and it cannot be assumed that the legislature intended an unreasonable or absurd construction, but a construction consonant with common sense and reason should be adopted. In that case there was involved a provision of the demurrage law giving shippers 48 hours for

unloading cars of less than 60,000 lbs. "capacity" and 72 hours for cars of 60,000 lbs. or greater "capacity." *Held,* that this did not refer to the capacity of the car but to the actual loading in the particular car.

In *Thompson* v. *State,* 20 Ala., 62, it is said:

> "If it be said the letter of the statute is opposed to this view and that the restriction against opening the road through an inclosure, while there is a crop growing thereon, is general, we reply that an interpretation should never be adopted which would defeat the purpose of the statute, if any reasonable construction may be given to it (The Emily, 9 Wheat., 381), and that the literal interpretation of an act is not always that which either reason or the law approves. The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not infrequently met with, often requires the court to look less at the letter or words of the statutes than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the lawgiver."

Is it not more reasonable to say that the proviso in question, wherever applicable, was intended to fix nine hours as the number of hours of service which might be required of train dispatchers at certain offices in any twenty-four hour period—that it is not important whether the hours of service are in fact made consecutive or not provided the aggregate or entire number of hours of work shall not exceed the maximum fixed? Is the public interested to any greater extent than to see that dispatchers and op-

erators are not worked an excessive number of hours during a day? Does a recess or intermission given for recreation during the hours of labor tend to refresh the laborer and enable him to resume his task with a rested instead of a fagged brain, or not? If not, why are recesses or intermissions between work usually allowed or given?

Conclusion.

To adjust the different phrases of the statute so as to fit the bed of the Government's contention, the Procrustean operation of lopping off and stretching would seem to be necessary. Again, in ignoring the words "continuously" and "on duty" and in giving a very narrow and unpractical construction to the word "period" the Government, to use a homely illustration, strains at a gnat and swallows a camel.

We respectfully submit that the office in which the operators in question worked was not one "continuously operated night and day," but on the contrary the duties of these operators were so light compared with those of a train dispatcher's office or some offices on the main line that public safety would not be jeopardized by placing them within the sixteen hour provision. On the other hand should the words "continuously operated" be construed contrary to their usual and ordinary meaning, and as embracing an office operated during a part only of the day time and a part only of the night time, yet the operators in question were not permitted to be

or remain *on duty* for a longer period than nine hours in any twenty-four hour period.

Inasmuch as the two operators at Corwith were each allowed *twelve consecutive hours* off duty for sleep or play and three additional hours for recreation or rest, or a total of fifteen hours during each twenty-four hour period, we are led to suspect that the vociferous cry of the Government's representatives, that our practice endangers the lives of travelers and employes and is violative of the spirit of the law, is lacking in that degree of candor and fairness which should characterize all contentions made on behalf of the Government. We respectfully submit that the purpose of the statute was in all respects accomplished by the practice adopted by the railway company and by the construction we have placed upon the entire Act.

ROBERT DUNLAP,
Attorney for Respondent.

GARDINER LATHROP,
Of Counsel.

EXHIBIT.

"Interstate Commerce Commission

No. 30041.

Office of the Secretary.

Washington.

May 7, 1910.

Edward A. Moseley,
Secretary.

Mr. J. E. Hurley,
G. M., Atchison, Topeka & Santa Fe Ry. Co.,
Eastern Lines, Topeka, Kansas.

DEAR SIR:

Some of the railroads in reliance upon the opinion of the Circuit Court of Appeals for the Seventh Circuit, reversing the decision of Judge Landis, in the case of the *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.,* have been violating the provisions of the Hours of Service Law, by splitting the period of service into tricks, or sub-periods of employment, in such manner as to stretch out the full period covered by the employment to a longer number of hours than that permitted by the statute.

It is but fair that these railroads and all other railroads should be notified that on April 25, 1910, the Supreme Court of the United States issued a writ of *certiorari,* directed to the Circuit Court of Appeals of the Seventh Circuit, requiring them to transmit the record in the case against the Atchison, Topeka & Santa Fe Ry. Co., for violation of the Hours of Service Law to the Supreme Court for a review of the proceedings in that case.

The issuance of this writ indicates that there is great doubt as to the maintenance of the position taken by the Circuit Court of Appeals and *prima facie* shows a disposition on the part of

the Supreme Court to sustain the Hours of Service Law according to its scope and tenor, and to the purpose and intent of its framers.

As the Interstate Commerce Commission is charged by law with the duty of enforcing the provisions of this Act, it is deemed proper to notify you at this time that if violations of the terms and provisions of that Act are continued the Commission will consider it to be its duty to institute proceedings in the various courts having jurisdiction of the same to enforce the law.

Very Respectfully,

EDW. A. MOSELEY,
Secretary."

UNITED STATES *v.* ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 504. Argued February 28, 1911.—Decided March 13, 1911.

In determining whether an office is one continuously operated, a trifling interruption will not be considered; and *quære*, whether a railway station shut for two periods of three hours each day and open the rest of the time is not a station continuously operated night and day within the meaning of §§ 2 and 3 of the act of March 4, 1907, c. 2939, 34 Stat. 1415.

Under §§ 2 and 3 of the act of March 4, 1907, c. 2939, 34 Stat. 1415, a telegraph operator employed for six hours and then, after an interval, for three hours, is not employed for a longer period than nine consecutive hours.

The presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted; and so *held* that the word "consecutive" is not to be implied in connection with limiting the number of hours during the twenty-four that telegraph operators can be employed under the act of March 4, 1907.

177 Fed. Rep. 114, affirmed.

THE facts, which involve the construction of the act of March 4, 1907, regulating the hours of service of railway employés, are stated in the opinion.

Mr. Wm. S. Kenyon, Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Philip J. Doherty*, Special Assistant United States Attorney, were on the brief, for the United States:

The telegraph office at Corwith was "continuously operated night and day" within the meaning of the statute. *Wood* v. *Sutcliffe*, 8 Eng. L. & Eq. 217, 220; *Garrison* v.

United Railways Co., 91 Maryland, 347. Such was the intent of Congress.

The distinction was between offices "operated only during the daytime" on the one hand and those operated "night and day" on the other hand. No distinction was attempted or intended between offices operated without interruption all day and all night, and such as were operated practically all day and all night, but not without interruption for one or another reason. Congress intended by the proviso to legislate concerning all offices, towers, etc.

In using the language in question Congress was merely classifying offices into two general classes and was not attempting exact definitions of either class; too much significance should not be given to a single word, but the general purpose of Congress should be carried out by construction.

The word "continuously" may be read in the sense of "regularly" or "habitually" or "customarily." *Hodge* v. *U. S. Steel Corporations*, 64 N. J. Eq. 807.

There is nothing in the statute which says that the operations must continue all day and all night.

As to the meaning of the expression "on duty for a longer period than nine hours in any twenty-four hour period," the purpose of the act is to secure rest for the employé in order that he may be able better to do his work with more safety to the public. Such rest should be a continuous rest, not intermittent, as would be possible under the construction contended for by defendants.

The Government contends that the term "on duty for a longer period than nine hours in any twenty-four hour period" is plain, and that the word period must be given some significance; that the period commences when the operator goes to work and continues nine hours therefrom. The word "period" cannot be construed as an unmeaning and useless word in this statute; it carries

with it the idea of a cycle, a term. A man works for a period of time. That may not mean that he works every hour of the time; that he cannot stop for lunch or sleep; but whether he stops or whether he works, the period goes on. *Sampson* v. *Peaslee*, 20 How. 571; 22 Am. & Eng. Ency. Law, 678; see definition in Webster and Standard Dictionary and Crabb's English Synonyms, p. 799; *People* v. *Lesk*, 67 N. Y. 521, 528; *State* v. *Strauss*, 49 Maryland, 288; *Re Becker*, 80 N. Y. Supp. 1115; Sutherland on Stat. Const., 2d ed., § 369.

The railroad's practice of splitting tricks breaks into the consecutive hours of rest which it was the intention of Congress that operators should have. Even if this is a penal statute, the forced and technical construction contended for by respondent should not be given. *Northern Securities Co.* v. *United States*, 193 U. S. 357; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Morris*, 14 Pet. 464; *People* v. *Bartow*, 6 Cowan, 290.

The mischief sought to be remedied is the splitting of tricks and the long hours of service. The remedy is continuous hours of rest. Hence, a period of nine hours of duty and no more in any twenty-four hour period. See *Heyden's Case*, 3 Coke, 7; Endlich on Interp. Stat., § 103; Potter's Dwarris, Stat. Constr., 194.

The act is remedial. When statutes are primarily remedial and the penal provisions are merely incidental to its enforcement, they are to be construed, if not liberally, at least so as to accomplish the congressional purpose. *Johnson* v. *So. Pac. R. R. Co.*, 196 U. S. 1, 17; *Schlemmer* v. *B. R. & C. Ry. Co.*, 205 U. S. 1, 10; *N. Y., N. H. & H. R. R. Co.* v. *Inter. Comm. Comm.*, 200 U. S. 361, 391.

As to history and phraseology of the proviso with reference to telegraph operator, see Sen. Bill 5133, 59 Cong.; 41 Cong. Rec., pt. 1, p. 893; H. R. Rept. No. 7641, 59th Cong., 2d sess., p. 1; 41 Cong. Rec., pt. 4, pp. 3235, 3756,

3761; pt. 5, p. 4342; 41 Cong. Rec., pt. 5, p. 4597; pt. 5, pp. 4621, 4636 and 4637; pp. 4597, 4621, 4599; pt. 5, pp. 4637, 4663.

The law does not unwarrantably interfere with the right of contract guaranteed by the Constitution. *Holden* v. *Hardy*, 169 U. S. 366; see *Muller* v. *Oregon*, 208 U. S. 412; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186. The law is a fair, reasonable and appropriate exercise of the powers of Congress.

Mr. Robert Dunlap, with whom *Mr. Gardiner Lathrop* was on the brief, for respondent:

The office in which the operators in question worked was not one "continuously operated night and day" within the purview of the statute and, therefore, such operators were not confined to nine hours' work. Their case fell rather under the general sixteen-hour provision.

Supplying the words which are necessarily omitted for the sake of brevity, the phrase would read, "offices, etc., which are continuously operated during the night and daytime." See *State* v. *Vanderbilt*, 37 Ohio St. 598; *Black* v. *D. & H. Canal Co.*, 22 N. J. Eq. 402; *Garrison* v. *United Railways Co.*, 91 Maryland, 347; *People* v. *Sullivan*, 9 Utah, 195; *Hodge* v. *Steel Corporation*, 64 N. J. Eq. 807. *El Paso* v. *Bank*, 71 S. W. Rep. 799, distinguished, and see *Rasmussen* v. *People*, 155 Illinois, 70; *Toberg* v. *Chicago*, 164 Illinois, 752; *Casey* v. *People*, 165 Illinois, 49; *Washington* v. *Bassett*, 15 R. I. 563.

Provisos or exceptions are strictly construed in taking cases out of general provisions. *United States* v. *Dickson*, 15 Pet. 158; *Savings Bank* v. *United States*, 19 Wall. 228.

Courts cannot suppose omissions were not intentional, and undertake to supply the same. *United States* v. *C. & N. W. Ry. Co.*, 157 Fed. Rep. 321; *State* v. *C., C., C. & St. L. Ry. Co.*, 157 Indiana, 288; *S. C.*, 61 N. E. Rep. 669, 670; *Re Herring*, 117 N. Y. Supp. 747; Sutherland, Stat.

Const., § 328. Penal statutes should be strictly construed. *Robinson* v. *Harmon*, 157 Michigan, 266, 278; *People* v. *Weinstock*, 193 N. Y. 481; *Nance* v. *Southern Railway*, 149 N. Car. 116; *United States* v. *Harris*, 177 U. S. 305, 309; *Bolles* v. *Outing Company*, 175 U. S. 265; *Lau Ow Bew* v. *United States*, 144 U. S. 59; *Chicago N. W. Ry. Co.* v. *Dey*, 35 Fed. Rep. 876; *Tozer* v. *United States*, 52 Fed. Rep. 917.

Penalties are not to be extended by construction. *A., T. & S. F. Ry. Co.* v. *People*, 227 Illinois, 270, 278; *State* v. *C., C., C. & St. L. Ry. Co.*, 157 Indiana, 288. The court cannot supply supposed omissions in the proviso. *Hobbs* v. *McLean*, 117 U. S. 579; *United States* v. *I. C. R. R. Co.*, 170 Fed. Rep. 549; *D., L. & W. R. R. Co.* v. *Inter. Comm. Comm.*, 166 Fed. Rep. 498; *S. C.*, 216 U. S. 531; *Konda* v. *United States*, 166 Fed. Rep. 91.

But if the nine-hour provision were applicable yet defendant would not be liable, since it did not permit operators at this office to be on duty longer than nine hours in any twenty-four hour period and the law does not forbid a splitting of the time or adjustment of the hours of service.

The manifest purpose of the law was to fix the number of hours of labor required and not the period within which by agreement the given number of hours of labor should be performed, beyond the limit prescribed of "any twenty-four hour period."

As to the word "period" in congressional legislation, see chap. 3594, 34 Stat. 607; H. R. Rep. 7641, 59th Cong., 2d Sess., on "Limiting the Hours of Service of Railroad Employés."

For Congress to undertake to say that the hours of work could only be consecutive and may not by agreement of the parties be distributed within the period of a day, would exceed the limit of police power and seriously impinge upon the liberty of contract. *Lochner* v. *New*

York, 198 U. S. 45; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; 22 Op. Atty. Gen. 62; *United States* v. *Langston*, 85 Fed. Rep. 613; *United States* v. *McCrory*, 119 Fed. Rep. 862.

As to the purpose of the law as manifested by Committee Reports during its passage, see Report No. 7,641, *supra;* Reports of Inter. Comm. Comm. for 1904, 1905; Resolution of Brotherhood of Railroad Trainmen, cited in report.

It is plain that Congress was considering the question of the number of hours of labor which should be fixed and was seeking to prohibit employés from working an excessive number of hours a day.

A sensible construction should be adopted and one not leading to any unreasonable or absurd consequences. *East* v. *Brooklyn R. Co.*, 195 N. Y. 409; *In re the Opinion of Justices*, 72 Atl. Rep. 754; *Market Co.* v. *Hoffman*, 101 U. S. 116; *United States* v. *Kirby*, 7 Wall. 486; *Darlington Lumber Co.* v. *Mo. Pac. Ry. Co.*, 216 Missouri, 658; *Thompson* v. *State*, 20 Alabama, 62.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover penalties for violation of the 'Act to promote the safety of employés and travellers upon railroads by limiting the hours of service of employés thereon.' March 4, 1907, c. 2939, §§ 2, 3, 34 Stat. 1415, 1416. The Government had a verdict in the District Court, subject to exceptions, and the judgment was reversed by the Circuit Court of Appeals. 177 Fed. Rep. 114. 100 C. C. A. 534.

The case is this: By § 2 it is made unlawful for common carriers subject to the act to permit any employé subject to the act to be on duty 'for a longer period than sixteen consecutive hours,' or after that period to go on duty again until he has had at least ten consecutive hours off

duty, or eight hours after sixteen hours' work in the aggregate: Provided that no telegraph operator and the like shall be permitted to be "on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the day time," with immaterial exceptions. By § 3 there is a penalty of not exceeding five hundred dollars for each violation of § 2. The defendant was subject to the act. It had a station and telegraph office at Corwith, in the outer limits of Chicago, which was shut from twelve to three by day and by night, but open the rest of the time. The Government contends that this was a place "continuously operated night and day." At this station the same telegraph operator was employed from half past six o'clock in the morning until twelve and again from three P. M. to half past six, or nine hours, in all, of actual work. The Government contends that when nine hours have passed from the moment of beginning work the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work. According to the Government's argument the operator's nine hours expired at half past three in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

We are of opinion that the Government's argument cannot be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the Government is right in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not

operated only during the daytime as falling under the other head. A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

But if we concede the Government's first proposition it is impossible to extract the requirement of fifteen hours' continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine 'consecutive' hours, as was said in the earlier part of the section, and if it had said so, or even 'for a longer period than a period of nine consecutive hours,' still the defendant's conduct would not have contravened the literal meaning of the words. A man employed for six hours and then, after an interval, for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours. Indeed, the word consecutive was struck out, when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. The Government suggests that if it is not implied a man might be set to work for two hours on and two hours off alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word consecutive in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in § 2 to 'sixteen consecutive hours' and 'sixteen hours in the aggregate,' show that the obvious possibility of two periods of service

in the same twenty-four hours was before the mind of Congress, and that there was no oversight in the choice of words.

Judgment of Circuit Court of Appeals affirmed.

END

OF

CASE